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THE LAWFULNESS OF CANADIAN INTERDICTION OF STATELESS VESSELS ON THE HIGH SEAS IN COUNTER-NARCOTICS AND COUNTER-TERRORISM OPERATIONS

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ABSTRACT

The Canadian Armed Forces (CAF) is boarding suspected stateless vessels in the Arabian Sea region in order to locate and destroy smuggled narcotics. The stated goal of this operation is to keep drugs off Canadian streets and eliminate a purported source of criminal and terrorist financing. This CAF operation, like any other, must be based in international law and Canadian domestic law. Yet, this operation may lack a legal basis. Such a deficiency would be contrary to the rule of law and increase legal risk to the Government and CAF members. Examining this issue is the purpose of this inquiry.

International law permits warships to visit and search suspected stateless vessels in order to verify their status but it does not explicitly allow for counter-narcotics or counter-terrorism activities. However, because narcotics are universally unlawful, international law likely does not prohibit the seizure and destruction of these drugs from stateless vessels, but such enforcement action will almost certainly give rise to human rights obligations in respect of the persons on such a vessel.

In domestic law, this operation is undertaken based on Government executive authority, or the Crown prerogative. This is a sound basis to visit and inspect stateless vessels. However, the prerogative can be displaced or restricted when a statute occupies the "same ground." This appears to be the case regarding the CAF's search for, and seizure and disposal of, narcotics. The *Criminal Code*, in limited circumstances, provides for enforcement action against narcotics trafficking and terrorism outside of Canada but it does not authorize the counter-narcotics and counter-terrorism activities currently being undertaken. This gives rise to concerns regarding the lawfulness of this CAF operation.

CHAPTER I - INTRODUCTION

Operation Enduring Freedom and the Maritime Component

In October 2001, the United States established Combined Task Force 150 (CTF-150) which was given responsibility for maritime security and counter-terrorism operations in the Arabian Sea and the surrounding region.[1] The main task of CTF-150 is conducting visit, board, search and seizures in respect of vessels suspected of involvement in activity related to terrorism or transporting weapons or other illicit cargo. This Task Force is currently part of Operation Enduring Freedom or OEF, launched in response to the terrorist attacks of 11 September 2001 on the United States (the U.S.).[2] The legal basis for OEF was, and remains, the national right of self-defence as enshrined in Article 51 of the *Charter of the United Nations* (the *UN Charter*).[3]

Since the early days of the "war on terror," Canada has contributed a warship to OEF. Canada's contribution was first under Operation Apollo, followed by Operation Altair and now, Operation Artemis.[4] This Operation commenced in 2012 and is the Canadian Armed Forces' (CAF) participation in maritime security and counter-terrorism operations in the Arabian Sea. According to CAF information, the Canadian warship participating in Operation Artemis will detect, deter and protect against terrorist activity by patrolling and conducting maritime security operations in her area of responsibility.[5] In what can be gleaned from the press, the primary activity conducted is searching for "illicit cargo" and specifically, narcotics that are believed to

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[1] Arabian Sea, Gulf of Aden, Gulf of Oman, Red Sea, and the northwest quadrant of the Indian Ocean.

[2] Website of Combined Maritime Forces, last accessed 4 March 2014, http://combinedmaritimeforces.com/ctf-150-maritime-security/.

[3] Dominic McGoldrick, *From 9-11 to the Iraq War 2003* (Oxford: Hart Publishing, 2004), 10-11.

[4] Rear-Admiral Bob Davidson, "Modern Naval Diplomacy – A Practitioner's View," *Journal of Military and Strategic Studies* 11, no. 1 and 2 (Fall and Winter 2008/9): 4, last accessed 14 April 2014, http://www.jmss.org/jmss/index.php/jmss/article/viewFile/80/90.

[5] Website, CAF Current Operations Abroad, Operation Artemis, last accessed, 15 December 2013, http://www.forces.gc.ca/en/operations-abroad-current/op-artemis.page.

be funding terrorist organizations.[6] However, a CAF news article from 2013 states that boarding parties also confirm the "legality of cargo *or passengers* [emphasis added]" and gather information "to determine if the cargo or passengers are linked to terrorism."[7]

It appears that the CAF initially boards vessels for the purpose of flag verification or if they are suspected of being stateless.[8] As will be discussed, this is a well-recognized right in accordance with the *United Nations Convention on the Law of the Sea*.[9] However, other activities conducted during this Operation are akin to law enforcement, such as searching for narcotics. These activities go beyond this well-established right and have no obvious basis in international or domestic law. Indeed, the lawfulness of such operations remains a pressing question for analysis and is the central reason for this inquiry. Providing an answer, involves examining the nature of the Operation and several bodies of both international and domestic law. With regard to international law, the inquiry focusses on the concept of extraterritorial jurisdiction, the law of the sea, and human rights law. The basis for this Operation in Canadian domestic law proves to be more elusive and this portion of the inquiry involves examining the mandate of the CAF, the Government's legal authority to employ the CAF on this type of operation, and the limits on this authority.

What is the Nature of this Type of Operation

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[6] "Having a blast – HMCS Toronto destroys narcotics at sea," (17 June 2013), last accessed 17 April 2014, http://www.forces.gc.ca/en/news/article.page?doc=having-a-blast-hmcs-toronto-destroys-narcotics-at-sea/hi48me15.

[7] Navy News - Operation Artemis: Boarding parties critical to maritime security (25 Nov 2013), last accessed 17 April 2014, http://www.navy-marine.forces.gc.ca/en/news-operations/news-view.page?doc=operation-artemis-boarding-parties-critical-to-maritime-security/hofhskw5.

[8] "Operation ARTEMIS: BZ Toronto!" (16 July 2013), last accessed 17 April 2014, http://www.forces.gc.ca/en/news/article.page?doc=operation-artemis-bz-toronto/hjh8a7y5. Efthymios Papastavridis, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas," *The International Journal of Marine and Coastal Law* 25, (2010): 588 states that most drug traffickers operate in unregistered vessels. The concept of "statelessness" will be addressed at length. Essentially, it means that the vessel does not "belong" to any state, it is without a nationality and therefore enjoys no legal protection on the high seas.

[9] 10 December 1982, 1833 U.N.T.S. 3.

The nature of any operation will determine its required international and domestic legal bases. For example, targeting enemy combatants requires a basis in the law of armed conflict and a Government decision to employ the CAF in this conflict. On the other hand, CAF assistance to the police for a hostage rescue would generally be governed by statute law and normally requires a request for assistance from the law enforcement agency. Unfortunately, it is not obvious whether Operation Artemis is a law enforcement mission, a mission of national security or related to national defence, but the tasks conducted have the appearance of law enforcement.

In the approximate 10 months that Her Majesty's Canadian Ship (HMCS) Toronto was attached to CTF-150, she recovered 8.22 metric tonnes of narcotics. These interdiction operations involve a very thorough search of the vessel, in some cases, taking hours to locate well concealed narcotics hidden in unlikely areas. "Vessels are systematically searched to ensure we do not miss anything," said a member of the HMCS Toronto's naval boarding party.[10] When drugs are found, they are catalogued and then destroyed. The Commanding Officer of the HMCS Toronto described this type of boarding as "very dangerous work."[11] Paul Koring of the *Globe and Mail* reported that earlier OEF maritime missions conducted by the CAF included leadership interdiction operations to locate and detain suspected Taliban and al-Qaeda members.[12] It is not

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[10] "Having a blast – HMCS Toronto destroys narcotics at sea," (17 June 2013), last accessed 17 April 2014, http://www.forces.gc.ca/en/news/article.page?doc=having-a-blast-hmcs-toronto-destroys-narcotics-at-sea/hi48me15.

[11] Simon Kent, "HMCS Toronto crew celebrate for job well done," *Toronto Sun*, 20 December 2013, last accessed 15 March 2014, http://www.torontosun.com/2013/12/20/hmcs-toronto-crew-celebrated-for-job-well-done.

[12] Paul Koring, "Boarding Ships Nerve-racking," *The Globe and Mail*, 12 Dec 2002, A19. House of Commons Standing Committee on National Defence, "Canadian Forces in Afghanistan," (June 2007): 42, last accessed 22 April 2014, http://www.parl.gc.ca/content/hoc/Committee/391/NDDN/Reports/RP3034719/nddnrp01/nddnrp01-e.pdf. Vice Admiral Buck (speech Navy League, 16 Jul 2002), last accessed 22 April 2014, http://www.navyleague.ca/_documents/OP%20APOLLO.pdf.

clear if the current operation still involves "human interdiction," or whether any Taliban or al-Qaeda members have been located, or what would happen if they were.[13]

The law enforcement nature of this operation is further illustrated by the public pronouncements of military officials and Government Ministers. In reference to the seizure of 500 kilograms of heroin, the former Minister of National Defence stated, "This massive narcotics seizure is one example of how the CAF members deployed in Canada and around the world are making a difference in international security and stability by denying criminals, and possibly terrorists, their source of funding." Regarding this same seizure, the then Minister of Public Safety, Vic Toews, stated, "[This seizure] demonstrate[s] that Canada is playing an instrumental role in keeping illicit drugs off Canadian streets . . . we continue to strengthen ties with allies, confront transnational organized crime and keep drugs away from Canadian shores." The Commanding Officer of the Ship stated, "It keeps the drugs off the streets and out of the hands of criminals, but it also has a massive impact on the finances of international terrorist organizations."[14] On 3 April 2014, the Minister of National Defence, when referring to the

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[13] Given the nature of the searches being undertaken and how they are described as very dangerous, three presumptions can be drawn. First, crews of the boarded vessels are being temporarily detained for the safety of the boarding party; it is not thinkable that the crew's movement would not be restricted while the vessel is searched. Second, given this danger, it is likely that boarding parties are armed and it is conceivable that force could be used by or against the boarding party. Third, given how thorough the searches are, presumably force or coercion of some sort is being employed to gain access to areas of the ship that are locked or secured. See also, Navy News, "Operation Artemis: Boarding parties critical to maritime security," (25 Nov 2013), last accessed 2 April 2014, http://www.navy-marine.forces.gc.ca/en/news-operations/news-view.page?doc=operation-artemis-boarding-parties-critical-to-maritime-security/hofhskw5.

[14] "HMCS Toronto makes history with massive narcotics haul," (31 March 2013) website: "Government of Canada News Releases," last accessed 9 March 2014, http://news.gc.ca/web/article-en.do?nid=729489. After a later seizure of 317 kg of heroin, the Commanding Officer of the ship stated, "Our operations are making a difference to help keep drugs off the streets and out of the hands of criminals." "Combined Maritime Forces Warship Makes Second Drugs Bust in Six Weeks," website, "U.S. Naval Forces Central Command," last accessed 16 April 2014, http://www.cusnc.navy.mil/articles/2013/130509%20082.html. The actual impact on the finances of terrorist organizations is an area for further analysis, specifically examining whether the terrorist organizations have already been paid when the drugs reach the Arabian Sea. It is also questionable whether these drugs would make their way to Canada. For a discussion of drug trafficking routes see United Nations Office on Drugs and Crime, "Misuse of Licit Trade for Opiate Trafficking in Western and Central Asia: A Threat Assessment," (October 2012), last

recent seizure and destruction of drugs by HMCS Regina, said this ". . . demonstrates the Government of Canada's resolve to help rid the region of activities that serve as a threat to maritime security and commerce while keeping narcotics off Canadian streets."[15]

Additionally, for Canada, it is likely that the mission is currently not conducted under the law of armed conflict, despite references to a "war on terror" and despite previous United Nations (UN) Security Council resolutions that linked this mission to the Afghan conflict. The UN Security Council has referred in several resolutions to OEF, its maritime component, and links between terrorism and the drug trade. In 2005, Resolution 1589 called upon ISAF and the OEF coalition to address the threat posed to Afghanistan not only by the Taliban and al-Qaeda but also by criminal activity ". . . and in particular violence involving the drug trade."[16] UN Security Council Resolutions 1373 and 1817 referred to a close connection between international terrorism and transnational organized crime and trafficking in illicit drugs.[17]

In September 2007, the Security Council addressed the legal basis for the maritime component of OEF.[18] Resolution 1833 (2008), and a subsequent resolution, expressed the Council's appreciation to the "OEF coalition including its maritime component, which operates within the framework of the counter-terrorism operations in Afghanistan and in accordance with the applicable rules of international law."[19] Arguably, *linking* the maritime component to the

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accessed 12 April 2104, http://www.unodc.org/documents/data-and-analysis/Studies/Opiate_Trafficking_and_Trade_Agreements_english_web.pdf.

[15] "HMCS Regina Disrupts Narcotics Shipment At Sea," (3 April 2014), website Government of Canada News Releases, last accessed 25 April 2014, http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=835049. There is no explanation of how narcotics trafficking threatens "maritime security" other than perhaps indirectly through the funding of terrorist groups. Similarly, in public sources, there is no evidence that the seized drugs were bound for Canada.

[16] UNSC Resolution, 5148th Mtg., UN Doc. S/RES/1589 (2005) para 12.

[17] UNSC Resolution, 4385th Mtg., UN Doc. S/RES/1373 (2001) para 4.

[18] Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), 206-207. UNSC Resolution, 5744th Mtg., UN Doc. S/RES/1776 (2007).

[19] UNSC Resolutions, 5977th Mtg., UN Doc. S/RES/1833 (2008); 6198th Mtg., UN Doc. S/RES/1890 (2009).

operations in Afghanistan recognized that the maritime operations were also taking place within a law of armed conflict framework which would *permit* more robust naval interdiction activities such as the right of belligerent visit and search.[20] However, later resolutions dropped the reference to maritime forces and the most recent resolution from 2013 no longer reaffirms or recalls those earlier resolutions.[21]

For Canada to have belligerent rights vis-à-vis "enemy merchant vessels," Canada must be a Party to an armed conflict, or arguably, facing a current severe danger amounting to an imminent threat of an armed attack.[22] This later occurrence would then give rise to the right of self-defence.[23] With the end of Canadian military involvement in Afghanistan, it is difficult to see how Canada could continue to assert that it is in an armed conflict with al-Qaeda.[24]

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[20] Efthymios Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford: Hart Publishing, 2013), 6.

[21] UNSC Resolutions, 6395th Mtg., UN Doc. S/RES/1943 (2010); 7041st Mtg., UN Doc. S/RES 2120 (2013).

[22] In regard to maritime interdiction in an armed conflict, see rule 118 of the *San Remo Manual*: "*In exercising their legal rights in an international armed conflict at sea* [emphasis added] belligerent warships . . . have a right to visit and search merchant vessels . . . ." Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (Cambridge: Cambridge University Press, 1995). Regarding self-defence, Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 78-79 discusses extra-territorial law enforcement (which would not normally be permitted by international law) as a form of self-defence in response to an armed attack. A law of the sea expert, Wolff Heintschel von Heinegg, discusses how the right of self-defence in accordance with the *UN Charter*, *in the absence of an armed conflict*, would allow states conducting maritime interdiction operations to disregard the rights of the flag state. Wolff Heintschel von Heinegg, "Maritime Interception/Interdiction Operations" in *The Handbook of International Law of Military Operations*, eds. Terry Gill and Dieter Fleck, 390 (Oxford: Oxford University Press, 2010). This issue leads to the debate regarding whether an armed conflict begins with the attack or with the response, and how a state can respond to an armed attack, or the imminent threat of one, without this necessarily giving rise to an armed conflict. This is beyond the scope of this paper. For a brief discussion of this issue see, Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2010), 74-92.

[23] In discussing OEF maritime operations and the right of self-defence, Wolff Heintschel von Heinegg writes, "It may be added in this context that if a vessel can be connected to a persisting threat of transnational terrorism, no further conditions have to be met." Wolff Heintschel von Heinegg, "Security at Sea: Legal Restraints in Lack of Political Will? Comments in the Keynote Address by Admiral Hoch," in, *Legal Challenges in Maritime Security*, Myron H. Nordquist *et al*. eds., 146 (Leiden: Martinus Nijhoff Publishers, 2008).

[24] For a non-international armed conflict to exist, the hostilities must meet a threshold level of intensity and the Parties must meet a threshold level of organization. For an excellent summary see Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010). The existence of a non-international armed conflict is a complex issue and is beyond the scope of this paper.

Additionally, the recent failure of the Security Council to mention maritime operations may signal that CTF-150 is no longer seen as part of *any* Afghan conflict. This may be because there is not a sufficient nexus between the maritime operations and the fight against the insurgent groups involved in the Afghan conflict, or it could simply be Security Council "politics." In any event, it is *not* possible to conclude that the Canadian CTF-150 operation is supported by the law of armed conflict.

As for self-defence, Christine Grey, a respected international law scholar, writes, "The longer [OEF] continues, the further it is detached from its initial basis in self-defence."[25] However, rather than analysing this self-defence issue, I will take the cautious approach and assume the threshold has not been met for each and every interdiction that Canada has undertaken. Therefore, for the purpose of this paper, it is assumed that current operations are occurring within a peace-time regime, not based in international humanitarian law (IHL) or the right of self-defence.[26] In the absence of an armed conflict, the law enforcement paradigm applies to counter-terrorism activities as do the restrictions on extraterritorial enforcement of domestic law.[27] This is consistent with the Government of Canada's Counter-Terrorism Strategy, *Building Resilience Against Terrorism*, that states, "Terrorist activities are criminal acts. The

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[25] Christine Gray, *International Law and the Use of Force*, 3rd ed. (Oxford: Oxford University Press, 2008), 206 cited with approval by Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 91.

[26] It is also assumed that the plea of necessity, which would permit derivation from the normal rules of international law regarding law enforcement in peacetime, is not justified. International Law Commission, "Draft Articles on Responsibility for States for Internationally Wrongful Acts," *General Assembly Resolution 56/83* (12 December 2001), Annex, Article 25, last accessed 22 April 2014, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/56/83&Lang=E.

[27] Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law," *Notre Dame Journal of International and Comparative Law* (2013): 40-42, last accessed 22 April 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2211219&download=yes. Natalie Klein, "The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," *Denver Journal of International Law and Policy* 35, no.2 (2006-2007): 308. I recognize that there is also the possibility that the right of self-defence would remove the normal restrictions on extraterritorial enforcement of domestic law, *but in the absence of an armed conflict, the use of force is always governed by the law enforcement paradigm*.

Government will always aim to support the prosecution of those responsible for terrorist activities in Canada or abroad whenever possible . . . ."[28]

However, the fact that this Operation is conducted by a naval vessel as part of a counter-terrorism mission suggests that the drug trafficking is also viewed as something *more* than law enforcement.[29] This view is consistent with changes between the 1960s and the 1980s, in rhetoric surrounding anti-drug activities. Although drugs were still referred to as "evil," there was an increasing emphasis on the "war" metaphor, a sign that drugs were being "securitized," or seen as a threat to the security of the state.[30] Additionally, because international law imposes significant constraints on civilian law enforcement activities, states are increasingly inclined to address transnational crime through military action.[31] Since the beginning of the "war on terror" this discourse on drugs as a threat has moved from the national to the regional and to the international level.[32] Beyond just drug trafficking, the nature of transnational criminal activity and terrorism ". . . makes the dividing line between law enforcement, national security, and foreign and national defence matters increasingly artificial and difficult to delineate."[33]

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[28] Government of Canada, *Building Resilience Against Terrorism: Canada's Counter-Terrorism Strategy* (2011), 11, last accessed 3 May 2014, http://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rslnc-gnst-trrrsm/index-eng.aspx.

[29] There can certainly be a disconnection between how the mission is seen and the legal authority employed. That is, even if something is metaphorically characterized as a "war on drugs," this alone does not lead to the application of the law of armed conflict.

[30] Barry Buzan, Ole Waever, and Japp de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998), 49-52.The 1961 *Single Convention on Narcotic Drugs*, 520 U.N.T.S 151, refers to the duty of the Parties "to prevent and combat this evil." The new war-metaphor relies on state-based thinking and is reflected in U.S. President Nixon's speech in 1971 when he announced that drugs were "enemy number one," and launched the "War on Drugs." E. Crick, "Drugs as an existential threat: An analysis of the international securitization of drugs," *International Journal of Drug Policy* 23, no. 5 (2012), last accessed10 April 2014, http://dx.doi.org/10.1016/j.drugpo.2012.03.004.

[31] Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law," 8.

[32] E. Crick, "Drugs as an existential threat: An analysis of the international securitization of drugs." *International Journal of Drug Policy* 23, no. 5 (2012).

[33] Robert Mandel, *Dark Logic: Transnational Criminal Tactics and Global Security* (Stanford: Stanford University Press: 2011), 19. Transnational Crime has been described as crime other than crimes for which there is

The deployment of a Canadian warship to "combat" drug trafficking with alleged links to terrorism is consistent with Royal Canadian Navy doctrine.[34] This doctrine identifies the growing threat posed by international criminal organizations, and how international crime has moved from being solely a law enforcement matter to also being a matter of national security.[35] However, this process of securitization blurs the lines of responsibility within government and actually makes military operations more complicated. As Rear-Admiral Davidson states, much of the Operation Artemis mission could be described as "international policing" and "this blending of military and constabulary roles significantly complicates operations."[36] Indeed, it appears that this Operation does not fit neatly into a defence, national security or law enforcement category.[37]

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acceptance of universal jurisdiction, such as piracy, and other than crimes for which there direct liability of individuals under international law, such as war crimes: "However, these are the types of crimes that affect the interests of several, and sometimes a large number, of states, whether those interests are criminal, economic, social, or cultural." Robert Currie, *International & Transnational Criminal Law* (Toronto: Irwin Publishing, 2010), 19. Terrorism and drug trafficking are such transnational crimes. Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law," 3. Canada's Counter-Terrorism Strategy addresses the roles of Foreign Affairs, security intelligence agencies, law enforcement agencies and the military in preventing, detecting, denying and responding to terrorism. Presumably "terrorism" cannot fit neatly into either category. *Building Resilience Against Terrorism*, 12.

[34] From the comments in the press, the Government and CAF seem to be concerned with both the indirect threat drugs pose through alleged support to terrorism and also the direct threat they pose when they end up on Canadian streets.

[35] Canada, Directorate for Maritime Strategy, *Leadmark: The Navy's Strategy for 2020* (2001), 84.

[36] Rear-Admiral Bob Davidson, "Modern Naval Diplomacy – A Practitioner's View," *Journal of Military and Strategic Studies* 11, no. 1 and 2, (Fall and Winter 2008/9): 17, last accessed 22 April 2014, http://www.jmss.org/jmss/index.php/jmss/article/viewFile/80/90.

[37] The type of counter-terrorism or counter-drug operation addressed in this paper is quite different from CAF assistance being provided to the United States in its counter-drug operations, currently known as Operation Caribbe. The United States Department of Defense has been designated by statute as the lead agency of the U.S. government ". . . for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States, including its possessions, territories, and commonwealths." See, Department of the Navy, Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, Department of Homeland Security, and U.S. Coast Guard, *The U.S. Commander's Handbook on the Law of Naval Operations* (July 2007): para 3.11.4.2. Additionally, as will be discussed below, the U.S. has, by domestic law, extended its law enforcement jurisdiction over stateless vessels on the high seas and the person on board, and has many bilateral agreements that allow enforcement action against flagged vessels. Also see Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge: Cambridge University Press, 2009), 81, 89-94. So, the U.S. military has a clear mandate to undertake counter-drug operations. In support of these operations, Canada is essentially providing a platform. Operation Artemis is also distinct from many other operations conducted by the CAF. In Operation Artemis, although it is not authorized by

It is not the goal of this of this paper to determine whether securitization and the blending of military and constabulary roles are desirable but rather, to determine the legal basis for this Operation and the legal risks. However, it is noteworthy that framing an issue as one of "security" takes it beyond the "established rules of the game." When an issue is presented as an existential threat, it requires emergency measures and, ". . . actions outside the bounds of political procedure."[38] Specifically related to the topic at hand,

> [Some authors] have explored the idea that securitizing an issue such as the 'war on terror' and the 'war on drugs' can create a type of 'Frankenstein's Monster' whereby giving resources, power and legitimacy to the securitization, releases it from the ordinary checks and balances of normal policy making.[39]

The "international policing" undertaken by the CAF in this Operation is not conducted outside the law but, it has been released from the normal procedures of law enforcement which serve as a check and balance on the state's authority and as a guarantor of individuals' rights. As Kent Roach, a law professor at the University of Toronto, writes, "The worst post 9/11 abuses of human rights are not found in the carefully crafted legal language of the *Anti-Terrorism Act*, but in the informal and often secret world of Canada's participation in transnational counter-terrorism."[40]

The Need for a Legal Basis

IHL or by the UN Security Council, the enforcement measures being taken are not incidental to the mission such as detention or search conducted by the CAF in self-defence. In Artemis, these coercive measures seem to be the mission.

[38] Barry Buzan, Ole Waever, and Japp de Wilde, *Security: A New Framework for Analysis*, 23-24.

[39] E. Crick, "Drugs as an existential threat: An analysis of the international securitization of drugs." *International Journal of Drug Policy* (2012).

[40] Kent Roach, "Counter-Terrorism in and Outside Canada and In and Outside the Anti-Terrorism Act," *Review of Constitutional Studies* 16, no.2 (2012): 264.

It is perhaps trite to suggest that all CAF missions must have a solid basis in both international law and Canadian domestic law.[41] But in practice, things are not so simple. Operations such as Artemis straddle the line between traditional military operations and civilian law enforcement and implicate many areas of domestic and international law.[42] This can make determining the legal basis complex and confusing.[43] Yet, despite these challenges, and arguably because of them, and because of criticisms such as the one levelled by Kent Roach, it is crucial to ensure that operations are conducted in accordance with the rule of law.

The Supreme Court of Canada stated, "The rule of law, a fundamental principle of our Constitution, must mean . . . that the law is supreme over officials of the government as well as private individuals."[44] As one esteemed author, citing numerous Canadian cases, asserts, "It is the duty of the Crown and all of its servants or agents to abide by and obey the law."[45] This is reflected in the Government's own Counter-Terrorism strategy:

> Canadian society is built on the rule of law as a cornerstone of peace, order and good government. It follows that all counter-terrorism activities must adhere to the rule of law. Government institutions must act within legal mandates. Authorities for counter-terrorism efforts are defined by laws consistent with

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[41] Alexander Bolt, "Crown Prerogative Decisions to Deploy the Canadian Forces Internationally," in *Canada and the Crown: Essays in Constitutional Monarchy*, D. Michael Jackson and Philippe Lagassé, eds., 219-220 (Montreal: McGill-Queens University Press, 2014). In the *Medvedev* case, the European Court of Human Rights held that the detention was prescribed by international law but not by domestic law. *Medvedev and Other v France* (2010), E.C.H.R, no. 3394/03 at paras 90-92, last accessed 5 April 2014, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979. See Efthymios Papastavridis, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas," *The International Journal of Marine and Coastal Law* 25 (2010): 575, 580. Craig Allen, *Maritime Counterproliferation Operations and the Rule of Law* (Westport Connecticut, Praeger Security International, 2007), 152. Pieter Johannes Jacobus van der Kruit, "Maritime Drug Interdiction in International Law," (Ph.D thesis, University of Utrecht, 2007), 82, 219, last accessed 23 November 2013, http://dspace.library.uu.nl/bitstream/handle/1874/21871/full.pdf?sequence=6.

[42] Christopher A Donesa, "Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military," *Duke Law Journal* 41, no. 867 (1992): 869, last accessed 22 April 2014, http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3178&context=dlj.

[43] Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law," 41.

[44] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748.

[45] Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991), 9. He adds, "This requires that components of government purporting to act on behalf of the Crown be able to point to some positive authority for their actions."

> Canada's Constitution . . . . This principle includes respect for human rights, both those enshrined in the *Canadian Charter of Rights and Freedoms* (the *Charter*) and in international legal obligations, such as international human rights and humanitarian law.[46]

Moreover, Royal Canadian Navy doctrine states that the Navy will fulfil its mission while "reinforcing Canadian values." These values include "democracy and the rule of law" and "individual rights and freedoms as articulated in the *Charter*."[47]

Similar sentiments have been echoed by the European Court of Human Rights in the case of *Medvedyev and Others v France*, a case where the French boarded a foreign flagged vessel to take action against suspected drug traffickers.[48] One of the issues addressed by the Court was whether the suspects on board enjoyed the protections of the *European Convention on Human Rights*. The Court held:

> . . . the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them the rights and guarantees protected by the *Convention* which the States have undertaken to secure to everyone in their jurisdiction.[49]

That is to say, there can be no legal black holes; the persons on the vessels that are boarded can never be without legal protection.[50]

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[46] *Building Resilience Against Terrorism*, 11. A similar view is found in Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy* (April 2004), 1.

[47] *Leadmark The Navy's Strategy for 2020*, 92-93.

[48] *Medvedyev and Other v France*, no. 3394/03 E.C.H.R. (29 March 2010), last accessed 5 April 2014. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97979.

[49] *Medvedyev and Others v France* (2010) at para 81.

[50] Johan Steyn, "Guantánamo Bay: The legal black hole," (the 27th FA Mann Lecture, 25 November 2003), reprinted in *International and Comparative Law Quarterly*, 53 (2004): 1. See also, *R. (on the application of Abbasi (Feroz Ali) and Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department, Original application for judicial review*, [2002] EWCA Civ 1598 at para 64, the Court expressed its concern as to the manner in which the applicant was detained at Guantánamo Bay, noting that, ". . . in apparent contravention of fundamental principles recognised by [U.S. and English] jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole.'" last accessed 18 April 2014, http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2002/1598.html&query=abbasi+and+secretary+and+of+and+state&met

From a practical perspective, even though a vessel may be stateless, her crew have a nationality and that state or states may object to Canadian actions and have the right to exercise diplomatic protection on their citizens' behalf.[51] Additionally, a crew member of a stateless vessel being injured or killed could result in litigation in Canadian or foreign courts. For actions in a foreign court, there is arguably a defence of state immunity for actions within the scope of a CAF member's duties but this would be an issue perhaps influenced by Canada, but out of its control.[52] The issue of Government liability would largely depend on whether any force used by the CAF was lawful and also whether the boarding, and the operation as a whole, were in accordance with the law. For example, it could be alleged that the CAF's boarding, search and detention of the vessel and crew were not permitted by the law of the sea. Consequently, any

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hod=boolean. Silvia Borelli, "Casting light on the legal black hole: International law and detentions abroad in the 'war on terror,'" *International Review of the Red Cross* 87, no. 857 (2010).

[51] "The right of the State of nationality of the members of the crew of a ship to exercise diplomatic protection is not affected by the right of the State of nationality of a ship to seek redress on behalf of such crew members, irrespective of their nationality, when they have been injured in connection with an injury to the vessel resulting from an internationally wrongful act." International Law Commission, "Text of the Draft Articles on Diplomatic Protection," Report of the Fifty-Eighth Session, UNGA OR, Sixty-First Session, Supplement No. 10, UN Doc, A/61/10 (2006) Article18, page 90. See also the *Commentary* to Article 18 at 94: "Ships' crews are often exposed to hardships emanating from the flag State, in the form of poor working conditions, or from third States, in the event of the ship being arrested. In these circumstances they should receive the maximum protection that international law can offer."

[52] There are entire textbooks on this topic such as Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed. (Oxford: Oxford University Press, 2013) and Guilfoyle noted that sovereign immunity of law enforcement and the military personnel is a remarkably difficult question. See Guilfoyle *Shipping Interdiction and the Law of the Sea*, 301. That said, state immunity can extend to "representatives of the State acting in an official capacity." See Article 2(1)(b)(iv) of the *UN Convention on Jurisdictional Immunities of States and Their Property (not yet in force)*, UN doc. A/59/508, depositary notification C.N.141.2005, adopted by the UN General Assembly 2 December 2004 by resolution A/59/38, (Canada is not a signatory), and James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), 493. Guilfoyle suggests that the most apt analogy for a maritime interdiction is the status of foreign law enforcement personnel in a local jurisdiction, at 302. The law is clear that such personnel would have immunity. For example, see *Bouzari v. Iran* CanLII 871 (On CA), last accessed 6 April 2014, http://canlii.ca/t/1hdv4. State agents would likely have immunity for actions within the scope of their duties during a boarding with flag state consent. But, as Guilfoyle notes at 303, ". . . if foreign police officers are not treated as authorized law-enforcement officials by local law, their actions may be regarded as crimes by local courts." Guilfoyle suggests the *Rainbow Warrior* case is one of the few precedents that touches upon this issue in the absence of flag state consent. See, *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair* (1990), Reports of International Arbitral Awards, Vol. XX, 215-284, last accessed 8 April 2014, http://legal.un.org/riaa/cases/vol_XX/215-284.pdf. Although France did not argue sovereign immunity, New Zealand released the two French agents to France, but on condition that they be confined to a military base for three years.

force used by the *crew* could be argued to be lawful self-defence against the CAF's unlawful actions. An injured crewmember could also allege that excessive force was used against him, an issue that turns upon Canada's international human rights obligations. Finally, if the operation itself was not duly authorized in Canadian law, the CAF action against the stateless vessel would be lacking a legal basis, increasing the risk of Government liability.

Due to the limited extraterritorial reach of Canadian criminal law, it may not be possible to arrest and prosecute a crew member who assaulted a CAF member. Such a situation could lead to Parliament, the public and the Prime Minister inquiring as to whether this risk was considered prior to the CAF deployment. It could also lead to further examination of the overall legality of this Operation.

Even if the current activities are legally compliant, the boundaries on these activities are not clear. For example, if the seizure and destruction of illicit drugs was extended to items that are not regarded as universally unlawful such as small arms and conventional weapons, the international legal basis and the right to interfere with the owner's rights in his or her property would both be doubtful. Similarly, if there were only a speculative link between these items and terrorism, any legal basis would be even more questionable.[53] Therefore, a better understanding of the legal framework is beneficial. To provide an assessment of this mission, this paper must examine a broad range of topics, not all of which can be addressed in the depth they may deserve.

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[53] In 2002, the (seemingly Cambodian) *M/V So San* was en route from North Korea to Yemen and suspected of carrying weapons. The Spanish Navy boarded in accordance with the law of the sea in order to verify the vessel's nationality and discovered 15 Scud missiles. Because these missiles and their delivery to Yemen were not unlawful, no further action could be taken. See Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford: Oxford University Press, 2011), 107-108.

CHAPTER II- INTERNATIONAL LAW

As stated above, every CAF operation must have a basis in international and domestic law. In dealing with transnational issues, it is important to consider the relationship between international law and domestic law since Canadian courts increasingly consider international law, as well as how other states, such as the U.S., have addressed international law issues. Specifically, the interpretation of international human rights law (IHRL) norms found in *the International Covenant on Civil and Political Rights* and the *European Convention on Human Rights* may be of considerable value to Canadian Courts in interpreting the *Canadian Charter of Rights and Freedoms* (the *Charter*).[54]

Additionally, the Government of Canada, in respect of domestic law, can take action to enforce Canadian law and values outside of Canada. However, international human rights law limits the conduct of each state in respect of persons who are both within, *and outside of*, its territory.[55] Moreover, international law governs all states' actions on the high seas and limits interference in the affairs of other states. In response to an allegation that international law has been violated, it is no defence to assert that the violation was justified by domestic law.[56] Therefore, a deficient legal basis in international law for any activity or operation cannot be cured by Canadian law.

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[54] Hugh M. Kindred and Phillip M Saunders eds., *International Law Chiefly as Interpreted and Applied in Canada*, 4th ed. (Toronto: Edmond Montgomery Publications, 2006), 185. The *Canadian Charter of Rights and Freedoms* (being Part I of the *Constitution Act*, 1982) enacted by the *Canada Act 1982* (U.K.), c.11.

[55] The nature and extent of a state's human rights obligations to those persons outside its territory is a topic of current debate. The fact that *some* obligations exist, including the right to life, is nearly beyond dispute.

[56] *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 U.N.T.S. 331, Art 27. *Aveena and Other Mexican Nationals (Mexico v U.S.)*, [2004] I.C.J. Reports 12 at 65. Several other cases are cited in James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), 51 which states, "Here the position is not in doubt. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for breach of its obligations under international law." See also Robert Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., (Toronto: Irwin Law, 2013), 53.

In international law, there are treaties that address narcotics trafficking, and that address terrorism, but there is no standing authority to board and search vessels in respect of counter-terrorism or counter-narcotics activities.[57] The law of the sea recognizes the right of states to board vessels suspected of being stateless. However, beyond verifying the statelessness of the vessel, international law is not clear regarding what action states may take regarding illicit cargo, the vessel, or persons on board. Answers to these questions are based not only in the law of the sea but in the principles of international law regarding the extent to which a state may exert its authority over persons, things and events outside its territory, that is "extraterritorial jurisdiction." In order to examine this matter further, the question of jurisdiction must be addressed.

Jurisdiction

"The term 'jurisdiction' has multiple meanings and layers within meanings, all of which are driven by the context in which it is used."[58] In this context, jurisdiction is the right of the state to make rules and enforce those rules in regard to the conduct of persons.[59] Another author states that jurisdiction is ". . . the power of the state under international law to regulate or

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[57] With regard to "terrorism" see Natalie Klein, *Maritime Security and the Law of the Sea*, 170. The issue of counter-narcotics specifically is addressed below.

[58] Stephen Coughlan, Robert Currie, Hugh Kindred, and Teresa Scassa, "Global Reach, Local Grasp: Constructing Exterritorial Jurisdiction in the Age of Globalization," *Canadian Journal of Law and Technology* 6, (2007): 30.

[59] Vaughan Lowe, *International Law* (Oxford: Oxford University Press 2007), 171. Malcolm Evans, *International Law* 3rd ed. (Oxford: Oxford University Press, 2010), 313. As will be further discussed, this term is also used in human rights instruments where it has a different meaning. Legal obligations can also arise simply from *de facto* or physical "jurisdiction" or power over someone. *Medvedyev and Others v France* (2010) at para 67.

otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non –interference in domestic affairs."[60]

As should be apparent, jurisdiction can be divided into two types.[61] First, is enforcement jurisdiction which, like it sounds, is the authority of the state to enforce rules and laws "either by administrative action such as arrest and seizure or by judicial action through the courts or even administrative agencies of a state."[62] Enforcement jurisdiction requires a basis in domestic law and is very constrained by international law. But enforcement jurisdiction cannot exist without prescriptive jurisdiction which refers to the power of the state to make those rules or laws "whether by legislation, administrative rule, executive order, or sometimes judicial ruling."[63]

The starting point for jurisdiction is that it is territorial; a state has jurisdiction over all conduct by all persons within its territory. This is the territorial principle which is linked to sovereignty of the state. Subject to certain international human rights law obligations and other very limited exceptions, the state is free within its borders to exercise its jurisdiction as it pleases. Enforcement jurisdiction is closely tied to territory. Outside of its borders, a state may only exercise its enforcement jurisdiction within another state with that state's permission.[64] This is

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[60] Malcolm N Shaw, *International Law*, 645. The concept of jurisdiction is related to, and is a function of, state sovereignty. In very general terms, sovereignty implies the exclusive right and ability to exercise jurisdiction over a person or a subject matter, that is, exclusive jurisdiction.

[61] Jurisdiction can be categorized and divided in different ways but the categorization employed in this paper is that used by Robert Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 55. They state that this categorization is efficient and usable for international and transnational criminal law.

[62] Pieter Johannes Jacobus van der Kruit , "Maritime Drug Interdiction in International Law," (Ph.D thesis, University of Utrecht, 2007), 16.

[63] *Ibid*., 16.

[64] Vaughan Lowe, *International Law*, 184. James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., 478. See also *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, [2005] I.C.J. Rep.168 at 196-199.

because "the exercise of enforcement jurisdiction is an exercise of state sovereignty. . . .[65] An exercise of extraterritorial jurisdiction cannot interfere with the rights of others states; this is equally true in respect of actions taken on the high seas.[66]

During a maritime interdiction such as being conducted under Operation Artemis, the boarding and any subsequent seizure are both an exercise of enforcement jurisdiction.[67] As explained by a leading expert on the law of the sea:

> Shipping interdiction is thus a case of the extra-territorial exercise of enforcement jurisdiction, either by the flag state or non-flag state vessel. However, in any given case, one must inquire as to the permitted extent of the enforcement jurisdiction. An interdiction has two potential steps. The first stage is stopping, boarding and searching the vessel for evidence of the prohibited conduct . . . . Where boarding reveals evidence of such conduct, the arrest of persons on board and/or seizure of the vessel or its cargo may follow . . . . The boarding and seizure stages of interdiction involve different exercises of enforcement jurisdiction.[68]

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[65] Vaughan Lowe, *International Law*, (Oxford: Oxford University Press, 2007), 184. Dan E. Stigall, Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law, 16.

[66] Robert Curie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 54. Stephen Coughlan, Robert Currie, Hugh Kindred, and Teresa Scassa, "Global Reach, Local Grasp: Constructing Exterritorial Jurisdiction in the Age of Globalization," *Canadian Journal of Law and Technology*, 30-3. This rule does not prohibit a state consenting to another state exercising jurisdiction. This could occur on an *ad hoc* basis or be implemented through treaty.

[67] Douglas Guilfoyle, Maritime Interdiction and Weapons of Mass Destruction, *Journal of Conflict and Security Law* 12, (2007): 4. "Personal communication with Douglas Guilfoyle" (24 March 2014). Drew Tyler, "Does the Charter Float," *Canadian Yearbook of International Law*, (2010): 187, citing Guilfoyle. It could be suggested that anything short of an arrest of a person is not an exercise of enforcement jurisdiction. It is this author's view that this is not correct. The ability to interfere with navigation, board and inspect, and take further action, even short of an arrest, is still a power that resides solely with sovereigns. In taking this action, a sovereign is interfering with a right enjoyed by all states, the freedom of navigation, and enforcing its will on the vessel and by extension, on those on board. The law obliging states to respect the sovereignty of other states does not distinguish between a boarding and search versus an arrest. If either occurs in another state's territory or in respect of one of its vessels, such enforcement actions are an infringement on the right of sovereignty. Although not all authors agree that merely boarding and searching the vessel as explicitly provided for in the *UN Convention on the Law of the Sea* is an exercise of enforcement jurisdiction, they do agree that any further action against the vessel, cargo and crew is. See Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 80. Craig Allen, 152.

[68] Douglas Guilfoyle, "Maritime Interdiction of Weapons of Mass Destruction," *Journal of Conflict and Security Law* 12, (2007): 4.

But, as stated, enforcement jurisdiction requires prescriptive jurisdiction which is based in the legislation, or arguably executive authority, of the boarding state.[69] "If the substantive [prescriptive] jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful."[70]

Prescriptive jurisdiction, however, is not as constrained by territory as is enforcement jurisdiction. The extent to which a state can extend prescriptive jurisdiction to events and persons outside its territory in circumstances affecting other states is currently a controversial topic in international law.[71] The *Lotus Case* from 1927 is sometimes suggested to support a broad discretion for states to exercise jurisdiction outside their territory. In addressing prescriptive jurisdiction, in that case the Court concluded that states have a "wide measure of discretion" to exercise jurisdiction over "persons, property and acts outside their territory . . . which is only limited in certain cases by prohibitive rules."[72] However, this approach has been criticized by numerous scholars and ". . . it is widely accepted today that the emphasis lies the other way around."[73] Other experts agree and suggest ". . . it is for the State asserting some novel

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[69] Efthymios Papastavridis, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas," 575. Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 80. Peter J.J. van der Kruit, "Maritime Drug Interdiction in International Law," 16, 19, 219. Craig Allen, 152. "Personal communication with Douglas Guilfoyle" (24 March 2014).

[70] Ian Brownlie, *Principles of Public International Law* 7th ed. (Oxford: Oxford University Press, 2008), 311.

[71] Pieter Johannes Jacobus van der Kruit, "Maritime Drug Interdiction in International Law," 16.

[72] *Lotus Case, S.S. (France v Turkey)* (1927), Judgment, P.C.I.J. (Ser. A) No. 10, last accessed 17 April 2014, http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm. At para 45 the Court makes clear that, in respect of enforcement jurisdiction, the first and foremost restriction imposed by international law upon a state is that – failing the exercise of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state." This is cited with approval by James Crawford, *Brownlie's Principles of Public International Law* 8th ed. (Oxford: Oxford University Press, 2012), 478.

[73] Malcolm N. Shaw, *International Law* 6th ed. (Cambridge: Cambridge University Press, 2008), 656. Also, Antonio Cassese, *Cassese's International Criminal Law* 3rd ed. (Oxford: Oxford University Press, 2013), 273.

extraterritorial jurisdiction to prove that it is entitled to do so."[74] This assertion is supported by more recent cases from the International Court of Justice (the ICJ).[75] Two Canadian experts take a somewhat different approach to get to the same destination and suggest that this "wide discretion" recognized in *Lotus* probably only applies when the situation or event in question ". . . has some nexus to the state asserting jurisdiction."[76]

Rather than relying on this controversial proposition in *Lotus*, I will refer to a set of well know principles in international law that address when a state has a sufficient nexus with persons or activities outside its borders in order to exercise prescriptive jurisdiction. Of these principles of extraterritorial jurisdiction, the nationality of the offender is perhaps the one that is the most widely accepted. For example, Canada can make laws that apply to all Canadians wherever they may be, and has done so in respect of serious terrorism offences.[77]

The flip-side of this principle is the passive personality principle which allows for states to exercise jurisdiction over crimes in which their citizens were victims. The use of this principle is controversial except when used to address transnational crimes such as terrorism where all states have an interest in taking action.[78] In keeping with this principle, Canada has extended its jurisdiction over terrorism offences that occur outside Canada when the victim is Canadian.[79]

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[74] Vaughan Lowe and Christopher Staker, "Jurisdiction," in Malcolm D. Evans ed., *International Law*, (Oxford: Oxford University Press, 2010), 318-320.

[75] *Fisheries Case (United Kingdom v Norway)*, [1951] I.C.J Rep. 116 at 132. *Nottebohm Case*, [1955] I.C.J. Rep. 4 at 22-23. In a more recent case, three judges of the ICJ in a joint separate opinion commented that, ". . . the dictum [in the *Lotus* Case] represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies." *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium*), Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, [2002] I.C.J. 3 at para 51, last accessed 5 May 2014, http://www.icj-cij.org/docket/files/121/8136.pdf.

[76] Robert Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 60.

[77] s. 7(3.73)(c)(i) and 7(3.74)(a) *Criminal Code*, R.S.C.1985, c. C-46.

[78] Robert J. Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 70.

[79] s. 7(3.75)(a) *Criminal Code*.

Somewhat more relevant to drug trafficking on the high seas are the objective territoriality principle, the protective principle, and the concept of universal jurisdiction. The objective territoriality principle is linked to the first principle of jurisdiction, the territorial principle. The "objective" version of this principle holds that a state can assert jurisdiction when only an element of the offence is committed within that state, or ". . . where some harmful *effects stemming directly from the criminal act* [emphasis in original] are felt in the state.[80] The U.S. has extended this principle to the extreme in the "effects doctrine" – the state may exercise jurisdiction when an activity "produce[s] detrimental effects within it."[81] This doctrine is highly controversial and is not part of customary international law.[82]

The protective principle is like the territorial principle in that it is linked to sovereignty and recognizes that states are entitled to protect "vital national interests" even when threats arise abroad. As Shaw explains, "It is a well-established concept yet there are uncertainties as to how far it extends in practice and particularly which acts are included within its net."[83] Accepted implementation of this principle relates to the crimes of treason, espionage, counterfeiting of currency and passports, and some immigration offences.[84] Canada has made use of this principle in the *Security Offences Act*. This *Act*, when read with section 2 of the *Canadian Security Intelligence Services Act,* allows for extraterritorial jurisdiction in respect of "an offence under any law of Canada where . . . the alleged offence arises out of conduct constituting a threat to the security of Canada."[85] The U.S. has relied on this principle in its anti-terrorist legislation and ". .

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[80] Robert J. Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 66.
[81] *United States v Egan* 501 F. Supp 1252 (S.D.N.Y. 1980).
[82] Robert J. Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 66.
[83] Malcolm N. Shaw, *International Law*, 667.
[84] Robert J. Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 72-73.
[85] *Security Offences Act*, R.S.C., 1985, c. S-7. *Canadian Security Intelligence Service Act*, R.S.C., 1985, c. C-23. "Threats to the security of Canada" are defined at section 2 of the *Canadian Security Intelligence Service Act*

. in 'protecting' itself from the international trade in narcotics."[86] The objective territoriality and protective principles have justified arrests for narcotics as far as 700 miles from U.S. shores.[87]

The idea with universal jurisdiction is that any state can extend its prescriptive jurisdiction over certain criminal activities no matter where they occur, regardless of the nationality of those involved and without any nexus to that state.[88] Currently, the following crimes are most likely subject to universal jurisdiction: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.[89] "Some crimes may be universally condemned and even the subject of a 'prosecute or extradite' obligation yet still not be a crime of universal jurisdiction. Crimes prohibiting 'terrorist' acts have been cited by the courts as examples."[90] The exercise of universal jurisdiction remains complex and controversial.[91]

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to include, "foreign influenced activities within *or relating to Canada* [emphasis added] that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person," and "activities within *or relating to Canada* [emphasis added] directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state." This emphasized portion of the definition creates the extraterritorial prescriptive jurisdiction. See Robert J Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 72.

[86] Robert J Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 72.

[87] Patrick Sorek, "Jurisdiction Over Drug Smuggling on the High Seas: It's a Small World After All: *United States v Marino-Garcia*," *University of Pittsburgh Law Review* 44, (1982-1983):1095-1096, discussing the case of *United States v Warren*, 578 F.2d 1058 (5th Cir. 1978). Natalie Klein, *Maritime Security and the Law of the Sea*, 108 cites Sorek for this fact.

[88] For example, "Canada could assert prescriptive jurisdiction over a criminal act committed in Indonesia, by a national of Turkey, against a national of Japan, which was in no way directed against Canadian state interests." See Robert J Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed., 73.

[89] Stephen Macedo ed., *The Princeton Principles on Universal Jurisdiction*, (Princeton NJ: Program in Law and Public Affairs, 2001), 29, last accessed 18 March 2014, http://lapa.princeton.edu/hosteddocs/unive_jur.pdf. Drug offences were raised as candidates for inclusion" but were not ultimately selected, see page 48.

[90] Craig Allen, 110, citing *United States v Yousef* (2003) wherein the Court of Appeals held that universal jurisdiction did not extend to conspiracy to bomb U.S. aircraft in Southeast Asia. The Court of Appeal noted that the trial court improperly relied on commentators rather than on state practice (paras 132-144). The Court also noted at paragraphs 135-139, that piracy, war crimes and crimes against humanity are recognized as being subject to universal jurisdiction. *United States v Yousef*, 327 F.3d 56 (2d Cir.), cert denied 540 U.S. 933 (2003). Murder is an example of a universally condemned crime that is still not a crime of universal jurisdiction, see *United States v Furlong* 18 U.S. (5 Wheat.) 184, 197 (1820), last accessed 30 March 2014, http://supreme.justia.com/cases/federal/us/18/184/. This case was cited by the United States Court of Appeals Court when ruling that, even though drug trafficking is subject to universal criminalization and condemnation, this does make it a crime of universal jurisdiction. *United States v. Yimmi Bellaizac-Hurtado*, Case 11-14049, (United States

A rarely invoked thread of universal jurisdiction relates to situations where impunity for the alleged offenders might otherwise result, such as when offences are committed by stateless persons or on board stateless vessels on the high seas.[92] However, such a practice would be highly contentious and open to abuse; the better approach, and the one that is consistent with international law, is for states to prosecute their nationals or, at least, demonstrate a link with the crime or the perpetrator.[93]

A much used fictional example to illustrate prescriptive and enforcement jurisdiction and the limit on extraterritorial action would be if Canada outlawed smoking in the streets of Paris. While this would be within the constitutional competence of the Federal government and Parliament,[94] France may complain that it is an unlawful exercise of jurisdiction since it is not based on any principle of extraterritorial prescriptive jurisdiction. If this law only applies to Canadian citizens, it would likely be valid as it would fall within the nationality principle. But, since these Canadians are in France, they would also be subject to French prescriptive and enforcement jurisdiction, that is both Canada and France would have concurrent jurisdiction over Canadians smoking in Paris. Of course, any attempt by Canada to enforce the law in Paris, whether against a Canadian citizen or others, would violate French sovereignty and would therefore be contrary to international law.[95]

Court of Appeals, 11th Circuit, 2012), last accessed, 3 April 2014, http://www.ca11.uscourts.gov/opinions/ops/201114049.pdf.

[91] Robert J Currie and Dr Joseph Rikhof, *International &Transnational Criminal Law* 2nd ed.,73. There is currently a UN General Assembly Working Group addressing this issue. "The scope and application of the principle of universal jurisdiction," UN General Assembly, 67th Sess., UN Doc. A/RES/67/98 (2013).

[92] Harvard Research, "Draft Convention on Jurisdiction with Respect to Crime," *American Journal of International Law* 29 Supp (1935): 440-441, Article 10, last accessed 3 April 2014, http://heinonline.org/HOL/Page?handle=hein.journals/ajils29&div=5&collection=journals&set_as_cursor=11&men_tab=srchresults&terms=harvard|research|draft|convention|on|jurisdiction|with|respect|to|crime&type=matchall.

[93] Robert J Currie, and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 79.

[94] *Statute of Westminster,* 1931, 22 Geo. V, c.4, section 3.

[95] Robert Currie and Dr Joseph Rikoff, *International & Transnational Criminal Law* 2nd ed., 57.

It may be appealing to equate prescriptive jurisdiction with domestic law and enforcement jurisdiction with international law, but this is not entirely accurate. Prescriptive jurisdiction must originate in domestic law but must also be based in one of the principles of jurisdiction. Enforcement jurisdiction is very constrained by international law and generally cannot be exercised in another state without its permission, otherwise this would violate that other state's sovereignty. Enforcement jurisdiction must also have a domestic legal basis and the necessary authorization or direction for agents of the state to act extraterritorially.[96] The complex nature of these principles of jurisdiction and their application to stateless vessels, their crews and cargos is compounded by disagreement regarding the nature of the high seas and states' rights to exercise jurisdiction on them, the issues to which I now turn.

Law of the Sea

Although other international arrangements and agreements have developed interdiction regimes for specific threats, the starting point for any right to conduct a maritime interdiction is the *United Nations Convention on the Law of the Sea* (*UNLCOS*).[97] This regime ". . . is already almost universally accepted and is moving steadily closer to universal subscription."[98] This *Convention* repeats and codifies rules recognized in earlier conventions and in customary international law. It addresses the nature of the seas, and states' rights and obligations regarding

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[96] For example see section 477.1 of the *Criminal Code* that provides for extraterritorial prescriptive jurisdiction and 477.3 that provides for extraterritorial enforcement jurisdiction.

[97] The law of the sea has long since recognized that warships engage in a variety of activities other than the conduct of hostilities. The rights given to warships in Article 110 or any other article of *UNCLOS* to visit or take any other action in respect of a vessel on the high seas should not be confused with the rights of warships under the law of armed conflict. During an armed conflict combatants have extensive rights to board, seize and sink vessels that may be supporting their enemy that are quite distinct from the peacetime regime that is the subject of this analysis. See Douglas Guilfoyle, *Maritime Interdiction and the Law of the Sea*, 6. Craig Allen, 82.

[98] R.R. Churchill, and A.V. Lowe, *The Law of the Sea*. 3rd ed. (Manchester: Manchester University Press, 1999), 22.

them, and in particular, states' rights and obligations regarding their ships and those of other states.

Nationality, Freedom of the High Seas and its Exceptions

Although the purpose of this paper is to address stateless vessels that is, vessels without nationality, to understand this concept, it is helpful to understand the debate around the nature of the high seas and the concept of the "nationality" of a ship. *UNCLOS* defines the high seas negatively, as ". . . all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic State."[99] Very generally, and subject to other rules and exceptions, this refers to those parts of the seas that are beyond 200 nautical miles from the shore of any nation.[100] The legal nature of the high seas was contested until relatively recently. Freedom of the high seas, or more correctly, universal recognition of freedom of the high seas is a modern phenomenon. Throughout the 17th century, whether all states were free to use the high seas or whether the seas could be subjected to the sovereignty of any one state, was a matter of serious contention. However, "By 1700, there were only echoes of the sovereignty of the seas to be heard."[101] This rule is now codified in Article 89 of *UNCLOS*: "No State may validly purport to subject any part of the high seas to its sovereignty." It is now one of the "cornerstones of modern international law" that the high seas are open to all states and no state may validly claim sovereignty over them.[102] As a result of

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[99] *UNCLOS*, Article 86.

[100] *UNCLOS*, Article 57. Churchill and Lowe, 162-165. However, only those waters within 12 nautical miles of the coast (the "territorial sea") are the territory of the coastal state over which, the state exercises sovereignty. Beyond this, out to 200 nautical miles, states exercise certain rights over the waters and undersea resources but this region is not part of the state nor is it the high seas. See Churchill and Lowe 165-166.

[101] D.P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1984), 9-10.

[102] Churchill and Lowe, 204.

universal acceptance of freedom of the high seas, there are various rights or "freedoms" that *states* have on the high seas, the most significant is the freedom of navigation.[103]

Because states are the "personalities" that have the freedom of navigation, *UNLCOS* reflects that, "In general, the flag State, that is, the State which has granted to a ship the right to sail under its flag, has exclusive right to exercise legislative [prescriptive] and enforcement jurisdiction over its ships on the high seas."[104] However, a ship is not immune or "sovereign territory," that is, "Exclusiveness of the flag State's jurisdiction is not absolute."[105] Warships are routinely engaged in promoting and enforcing "public order" on the high seas by taking action against vessels, including those with a foreign flag or vessels that are stateless. A warship can only take such action against a foreign flagged vessel when the vessel is suspected of being involved in an offence or activity which states have agreed is a basis for an exception from the freedom of navigation.[106] Similarly, when a vessel is suspected of being stateless, and having no right to freedom of navigation, a warship may take action to confirm the status of the vessel. These exceptions from freedom of navigation, viewed another way, are the bases to conduct an interdiction.

UNCLOS recognizes five well established exceptions to the freedom of navigation on the high seas. These are contained in Article 110 and are in respect of: piracy; slave trading;

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[103] *UNCLOS*, Article 86-87. This term is not explained further in *UNCLOS* because this freedom is "iconic" and well established. It means that vessels of all states have navigational freedom; they cannot be impeded by other states as they travel the high seas. But this is subject to some constraints as contained in treaty and also subject to action taken by the UN Security Council under Chapter VII. See Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart Publishing, 2010), 224-227.

[104] Churchill and Lowe, 208. *UNLCOS*, Article 92(1).

[105] Churchill and Lowe, 209.

[106] Craig Allen, 80-81. This can lead to cases of concurrent jurisdiction where other states may share prescriptive jurisdiction or both prescriptive and enforcement jurisdiction. In addition to jurisdiction on the high seas, concurrent jurisdiction will occur when a ship is within the territory of another state. See D.P. O'Connell, 953.

unauthorized broadcasting; ships without nationality; and ships of uncertain nationality. Article 110(1) states:

> 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.

Article 110 continues and at paragraph 2 provides that, when a warship has reasonable grounds to suspect one of these situations, it may conduct a boarding and inspection of the suspected vessel; it has a "right of inquiry." "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."

Specifically with regard to suspected stateless vessels, the *Commentary* to *UNCLOS* states:

> The first function of the boarding party is to verify the ship's papers . . . . If suspicion remains after such an examination of papers, the boarding party may proceed to a further examination on board the ship. *Such further examination is not to be used for purposes other than those which warranted the stopping of the ship* [emphasis added], and is to be carried out with all possible consideration. Other powers of enforcement which may involve a visit are exercisable in accordance with Part XII on protection and preservation of the marine environment . . . .[107]

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[107] Satya N. Nandan and Shabatai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol. 3 (The Hague: Martinus Nijhoff Publishers, 1995), 245. Although not addressed at Article 110, *UNCLOS* at Part XII, and specifically Article 224, also provides for powers of enforcement for protection and preservation of the marine environment. LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012), 48.

What further action, if any, which may be taken in regard to a stateless vessel is a topic addressed below. First, it is helpful to clarify what a stateless vessel is and then examine some of the other provisions in *UNCLOS* relevant to interdictions.

Ships Without Nationality

Natalie Klein writes ". . . unregistered vessels have forfeited their right to freedom of navigation on the high seas [therefore] where a warship encounters a vessel and has a reasonable suspicion that the vessel lacks nationality, it may board the vessel."[108] This conclusion is uncontroversial given Article 110 of *UNCLOS*. However, a lack of registration cannot always be equated with a lack of nationality or statelessness:[109]

> Vessels may hold nationality through a right to fly a flag independent of registration. National legal systems commonly only require vessels of a certain size to register, and smaller vessels may be entitled to fly the flag of their owner's state of nationality without registration.[110]

This same point was raised during the drafting of the *UN Narcotics Convention*.[111] The United Nations Office on Drugs and Crime cautioned, "In the light of article 91(1) of *UNCLOS*, nationality is not contingent on registration and thus there might be cases that small vessels . . . may be unregistered but still enjoy nationality, e.g. derived from the owner."[112] The case of

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[108] Natalie Klein, *Maritime Security and the Law of the Sea*, 107.

[109] Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 54. Churchill and Lowe, 213, note 19. H. Meyers, *The Nationality of Ships*, (The Hague: Martinus Nijhoff, 1967), 149-150.

[110] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 95.

[111] *Ibid*., 95, note 92.

[112] United Nations Office on Drugs and Crime, *Combatting Transnational Organized Crime Committed at Sea: Issue Paper* (United Nations, New York, 2013), 34. Article 91 of *UNCLOS* states:

> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Hartwig v United States in 1927 held that, "The flag under which a merchant ship sails is *prima facie* proof of her nationality. If she is not properly registered, her nationality is still that of her owner."[113] This case was apparently in accordance with earlier cases from 1873 and 1905 and is cited by O'Connell in his treatise on the law of the sea.[114]

O'Connell asserts that a vessel "without nationality" is a vessel without protection but not without law. That is, the law of the state of nationality of the owner would still apply; jurisdiction could be asserted by this state.[115] The continued relevance of the nationality of the owner is demonstrated by the 2003 interdiction of the *BBC China*. This German owned ship was carrying centrifuge parts from Malaysia to Libya and was followed by U.S. and U.K. warships as it transited the Suez Canal.[116] Eventually, the German government convinced the German owner to order the ship into port in Italy for a cargo inspection. While this alone is not so noteworthy, the significance of this incident is that the ship was registered in Antigua and Barbuda and it does not appear that it had consented to the boarding and inspection.[117]

The likely current and correct position is that the requirements and conditions of registration of vessels is a matter of domestic law. If a vessel is not required to be registered by domestic law, the vessel still possesses the nationality and protection of the state of its owner.[118] If however, the vessel is not registered, yet registration is required by the law of the owner's state, this vessel is not entitled to fly that state's flag; it is a vessel without nationality and

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[113] 19 F.2d 417 (1927). Contra, H. Meyers at 312 suggests that a stateless vessel is a potential "legal vacuum" unless all states have the potential to assert jurisdiction over them.

[114] D.P. O'Connell, 756.

[115] *Ibid*., 755-756. Churchill and Lowe agree with this proposition, 214.

[116] Andrew C Winner, "The Proliferation Security Initiative: The New Face of Interdiction", *The Washington Quarterly* 28, no.2 (Spring 2005): 137, last accessed 5 May 2014, http://www.usnwc.edu/getattachment/f752d9b3-b487-4285-8f34-887fc5aefe54/TWQ-Proliferation-Security-Initiative.aspx.

[117] Natalie Klein, *Maritime Security and the Law of the Sea*, 203.

[118] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 195.

therefore, without protection.[119] This view is supported by the wording of Article 91 of *UNCLOS*. However, the nationality of the owner seems to still be significant. Although the ship is without protection from the jurisdiction of other states; as O'Connell asserts, there is some authority for the proposition that the law of the owner's state of nationality continues to apply on board the vessel. From the above reasoning, it is apparent that assuming a vessel without evidence of registration is also without nationality carries some risk, as does assuming that no state will assert that its law applies on board such a vessel.[120]

Other Powers of Enforcement under UNCLOS

There are two offences provided for in Article 110 of *UNCLOS* for which all states may assume both prescriptive and enforcement jurisdiction, namely piracy and unauthorized broadcasting.[121] Additionally, *UNCLOS* provides for a right of visit for any vessel, regardless of nationality, when there are reasonable grounds to believe it is engaged in the slave trade. It is beyond the scope of this paper to address these topics at length other than to draw attention to the robust rights granted to states for these offences and how they contrast with drug trafficking and statelessness.[122]

With regard to piracy, *UNLCOS* permits any state to seize a pirate ship on the high seas and prosecute the pirates and "decide upon the penalties to be imposed."[123] "Article 105 gives expression to the universal jurisdiction which any state can exercise against any pirate ship or

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[119] David D. Caron, "Ships, Nationality and Status," at 403 in R. Bernhardt ed. *Encyclopedia of Public International Law* Vol. 4 (Amsterdam: North Holland, 2000).

[120] Guilfoyle discusses how an unlawful interdiction may violate article 2(4) of the *United Nations Charter* given the special relationships that vessels have with their state of nationality. See Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 272-277.

[121] Churchill and Lowe, 212. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 176, 179.

[122] Natalie Klein, *Maritime Security and the Law of the Sea*, 131.

[123] *UNLCOS*, Article 105.

aircraft" and expressly provides for seizure of the vessel. Moreover, "The second sentence of Article 105 implies that the courts of the state which carried out the seizure will apply national law, including, where appropriate, national rules governing conflict of laws."[124]

Even regarding something as apparently benign as unauthorized broadcasting, robust action is permitted. Although *UNLCOS* does not grant universal jurisdiction over this offence, it allows any county where the broadcast is received or in which it may cause interference, to board the vessel and prosecute those on board. This right is also given to the flag state and the state of nationality of the person engaged in the broadcasting.[125] This provision is noteworthy in that it applies not only to stateless vessels but to flagged vessels and as such, is a significant infringement on the rights of the flag state. 7

In respect of suspected slave trading, there is a clear right to board and conduct a relevant search, even regarding vessels of another nationality. However, not all states have prescriptive or enforcement jurisdiction so any further action is limited to informing the flag state. If the vessel proves to be stateless, it could possibly be seized.[126]

UNLCOS: Narcotics and Terrorism

Unlike the three offences mentioned above, *UNCLOS* does not provide any right to visit or board on the basis of a suspicion that a vessel is supporting terrorism.[127] Similarly, there is no

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[124] *United Nations Convention on the Law of the Sea 1982: Commentary*, Vol. 3, 215-216.
[125] *UNCLOS*, Article 109.
[126] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 76. Churchill and Lowe, 212.
[127] Natalie Klein, *Maritime Security and Law of the Sea*, 305-308. The *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 U.N.T.S. 221 and its *Protocol* (2005), drafted to combat terrorism, are also of no assistance or relevance to the topic under discussion, last accessed 8 April 2014, http://www.imo.org/OurWork/Security/Instruments/Pages/SUA.aspx. There has been discussion as to

specific right granted to warships to visit or board a vessel on suspicion that it is trafficking narcotics.[128] In the *Medvedyev* case, the European Court of Human Rights stated, ". . . fighting drug trafficking is not among the offences listed in Article 110, suspicion of which gives rise to the right to board and inspect foreign vessels."[129] The Court noted the only provision that may be relevant is the right to board vessels suspected of being without nationality.

However, robust enforcement provisions have been considered. Nine Western European states, in 1974 at the second United Nations Conference on the Law of the Sea, proposed the following:

> Any State which has reasonable grounds for believing that a vessel is engaged in illicit traffic in narcotic drugs may, whatever the nationality of the vessel but provided that its tonnage is less than 500 tons, seize the illicit cargo. The State which carried out this seizure shall inform the State of nationality of the vessel in order that the latter State may institute proceedings against those responsible for the illicit traffic.[130]

Nevertheless, this proposal was not accepted. "Several delegations expressed concern about the effect that such language might have on the freedom of navigation, fearing that states might use it as a pretext for abuse or harassment." [131] Such proposals were also put forward at the third (1975); fourth (1976); seventh (1978); eighth (1979); and ninth (1980) sessions of the United Nations Conference on the Law of the Sea but were all rejected.[132]

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whether piracy could include "terrorism," (to the extent this term can be defined). Normally, piracy is understood to exclude acts with political motivations. However, this ". . . has been credibly challenged by Guilfoyle who argues that 'private ends' [in the definition of piracy] is not a question of subjective motivation of those involved but rather the lack of public sanction." See Natalie Klein, 119 and Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 32-42.

[128] Natalie Klein, *Maritime Security and Law of the Sea*, 131. Churchill and Lowe, 213.

[129] *Medvedyev and Others v France* (2010), 27. Although some states, such as the U.S. and the U.K. practice, "consensual" boardings of vessels suspected of drug trafficking, it is not general state practice. See Pieter Johannes Jacobus van der Kruit, "Maritime Drug Interdiction in International Law," 248.

[130] Third United Nations Conference on the Law of the Sea, "Belgium, Denmark, France, Federal Republic of Germany, Ireland, Italy, Luxembourg, Netherlands, UK: working paper on the high seas," (12 Aug 1974) A/CONF.62/C.2/L.54, Article 21(2) *bis*.

[131] *United Nations Convention on the Law of the Sea 1982: Commentary* Vol. 3, 227.

[132] *Ibid.*, 240-244.

Although there is no express right for states to conduct a counter-narcotics interdiction, Article 108 of *UNCLOS*, "Illicit traffic in narcotic drugs or psychotropic substances," does address the topic directly:

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

The *Commentary* states that, "Article 108 incorporates in the general law of the sea relevant aspects of the international control of traffic in narcotic drugs and psychotropic substances."[133] This Article does not alter the general rule that the flag state exercises prescriptive and enforcement jurisdiction over their vessels, it simply acknowledges that a flag state may request the assistance of other states in undertaking action that it has a right to undertake. There is no right to board foreign flagged vessels and there is no enforcement mechanism to complement the obligation to cooperate.[134] Cooperation is to take place in accordance with this Article when the traffic in narcotics is contrary to international conventions.

The UN Narcotics Convention

Although, not strictly speaking, a convention on the law the sea, the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988 (the *UN Narcotics Convention*) is a law enforcement treaty that specifically addresses maritime interdiction.[135] It recognizes that drugs are almost universally unlawful yet it does not provide for

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[133] *Ibid.*, 225.
[134] *Ibid.*, 226.
[135] *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 U.N.T.S 95. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 17.

universal jurisdiction. Rather, it obliges states to establish jurisdiction in their domestic law over offences on board vessels with their nationality, and it permits the exercise of jurisdiction on board foreign flagged vessels when arrangements are in place with the flag state.[136]

Universal jurisdiction for the trafficking of narcotics was suggested and rejected by State Parties during negotiations for an earlier Convention, the *Single Convention on Narcotic Drugs* (1961). During the negotiations for the 1988 *UN Narcotics Convention*, it was suggested that drug trafficking be made a "grave crime against humanity," thus, presumably making it a crime of universal jurisdiction. While this proposal was also rejected, it may appear that Article 4 of this *Convention* has opened to the door to universal jurisdiction.

The final paragraph of Article 4 states: "This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law."[137] Despite the appearance of universal jurisdiction, Guilfoyle observes, ". . . this would not allow the assertion of jurisdiction prohibited at general international law."[138] Presumably, a treaty provision granting states an "exemption" from accepted principles of jurisdiction in international law would be unequivocal.

Specifically addressing suspected stateless vessels, Article 17 of the *Convention* states:

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[136] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 17. It also permits jurisdiction to be established over conspiracies that occur outside the state that are aimed at commission of an offence inside the state. See Article 4(1)(b)(iii).

[137] Article 4(3).

[138] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 7. This is supported by the *Commentary* which states, ". . . the final paragraph of Article 4 should not be taken to mean that States are to regard themselves as being entirely free to establish any kind of extraterritorial jurisdiction that may have commended itself on policy or practical grounds. The issue of the proper limits of extraterritorial prescriptive jurisdiction is governed by the rules of customary international law. . . ." n.a., *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* E/CN.7/590 (New York: United Nations, 1998), 116. In light of modern criticisms of the *Lotus Case*, the correct interpretation may be that this provision only permits an assertion of jurisdiction when this is in accordance with one of the international law principles of extraterritorial jurisdictional.

> A Party which has reasonable grounds to suspect that a vessel flying its flag or *not displaying a flag or marks of registry* [emphases added] is engaged in illicit traffic may request the assistance of other Parties *in suppressing its use for that purpose* [emphasis added]. The Parties so requested shall render such assistance within the means available to them.[139]

According to Guilfoyle, "suppressing [the vessel's] use" for illicit purposes ". . . clearly contemplates action against stateless vessels beyond mere visit and search in international waters [as authorized by *UNLCOS*] . . . ." But, Guilfoyle is of the view that it is not clear exactly what is authorized and whether the vessel could be seized.[140] He writes, "If this right were uncontroversial, it is difficult to understand its omission from both *UNLCOS* and the *Narcotics Convention*."[141] Guilfoyle is drawing attention to Article 4 of the *Convention* that addresses jurisdiction. This Article addresses several bases for states to take jurisdiction, but statelessness of a vessel is not one of them,[142] despite the reference to "suppressing [their] use" in Article 17.

Unfortunately, the *Commentary* is of little assistance in ascertaining what action states can take against stateless vessels:

> . . . [the *Convention*] remains silent about the assumption of legislative powers over stateless vessels involved in the international traffic of narcotic drugs and psychotropic substances. The absence of specific treatment of this topic is somewhat curious, given the fact that article 17, paragraph 2, concerns requests for assistance in supressing the use of such vessels when engaged in illicit trafficking.[143]

So, just as with *UNLCOS*, this *Convention* provides no clarity as to what action states can take against stateless vessels trafficking in narcotics. Presumably, this is more than a drafting

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[139] Article 17(2).

[140] Douglas Guilfoyle, "Maritime Interdiction of Weapons of Mass Destruction," *Journal of Conflict and Security Law* 12, no.1 (2007): 9-10.

[141] *Ibid*., 10. Similarly, Papastavridis asserts that the authorized actions would seemingly extend to supressing the vessel's use for illicit purposes but he states that this provision does not provide for jurisdiction over the cargo or persons on board. Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 210-211.

[142] See note 136.

[143] n.a., *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* E/CN.7/590 (New York: United Nations, 1998), 110.

oversight and reflects a lack of consensus among states, which possibly arises out of at least two factors. First, some states may be unwilling to subject their nationals to prosecution in whatever state happens to interdict the vessel, which could be a death penalty state. Second, this first factor becomes more of an impediment if some or most states take the view that a ship must be treated as a "unit" and jurisdiction over cargo, persons and the vessel should not be segregated.[144] Nevertheless, several European countries did reach a consensus.

This Council of Europe addressed this curious omission regarding jurisdiction through a further European multilateral agreement, namely the *Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.[145] Article 3 of the Agreement states, ". . . each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law." This appears as a requirement that states enact legislation asserting universal jurisdiction. However, as is clear from Article 5 of this European Agreement, it is for the Party (that is, the state) "*most closely affected*" [emphasis added] to "determine what actions are appropriate and to exercise its jurisdiction over any relevant offences that may have been committed on the vessel." Therefore, it is implicit in this Agreement that the state that takes action against the drug trafficking has been affected by it. That is, this

[144] The "ship as a unit" is discussed further below.

[145] 1 May 2000, C.E.T.S. no. 156, last accessed 15 April 2014, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=156&CM=1&CL=ENG.

appears to be an exercise of protective jurisdiction or objective territoriality rather than establishment of a universal European jurisdiction.[146]

Jurisdiction Over the High Seas

As discussed, the right of visit, that is, to board, verify documents and inspect a suspected stateless vessel, is generally, if not universally, accepted.[147] However, this right would seem to be of limited utility in addressing narcotics trafficking and neither *UNCLOS* nor the *UN Narcotics Convention* grant an express right to take further action against stateless vessels trafficking narcotics. This lack of authority seems to be incongruous with the need for the rule of law. Meyers writes, "No international person may exercise sovereign rights over the high seas. All the same, in order to avoid lawlessness, to maintain international law, those present on or in the seas must be subject to the law."[148] When addressing stateless vessels, Meyers asserts, ". . . a legal vacuum, of floating sanctuaries of freedom from authority . . . . [are] an unacceptable situation for a universally applicable system such as international law."[149]

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[146] It appears that Spain has established universal jurisdiction over trafficking in narcotics, but favours interdictions being conducted by the state that will have the greatest interest in the detention and arrest of the person on board. See Dr. Vicenta Carreno Gualde, "Suppression of the Illicit Traffic in Narcotic Drugs and Psychotropic Substances on the High Seas: Spanish Case Law," *Spanish Yearbook of International Law* 4 (1995-1996): 91-106.

[147] *UNLCLOS*, Article 110(1)(d). Natalie Klein, "The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," 302.

[148] H. Meyers, 113.

[149] H. Meyers, 319, citing J.P.A Francois, "De status van kunstmatige eilanden," *Internationale Spectator* XVIII (1964), 120-122. This opinion is shared by Andrew Anderson, "Jurisdiction over Stateless Vessels on the High Seas," *Journal of Maritime Law and Commerce* 13, no.3 (April 1982): 336. However, international law, specifically the nationality principle of extraterritorial jurisdiction, permits the exercise of domestic law by the state of nationality of the persons on board a stateless vessel. While Meyers' view is generally not controversial, he was writing when *Convention on the Law of the Sea* (1958) did not address narcotic smuggling. The *Convention* did not include an explicit right of visit and search for stateless vessels but this was widely accepted. See David Anderson, *Modern Law of the Sea* (Leiden: Martinus Nijoff Publishers, 2008), 245. Also, see the case of *Naim Molvan v A.G. for Palestine*, [1948] AC 531 that pre-dates the 1958 *Convention*.

Therefore, it would be appealing to "read in" further enforcement powers to Articles 108 or 110 of *UNLCOS* to address stateless vessels trafficking in illicit substances. However, if the Parties to *UNCLOS* reached a consensus regarding such enforcement measures, presumably *UNCLOS* would include provisions similar to those addressing piracy or unauthorized broadcasting. This lack of consensus may be rooted in a deeper disagreement related to the right of states to exercise their jurisdiction on the high seas.

As discussed, the essence of "jurisdiction" is a state's ability to make and enforce rules. The disagreement among law of the sea experts is whether the high seas are a place where all states may exercise shared jurisdiction or where no state can exercise jurisdiction. This has significant implications for how one approaches the issue of the jurisdiction that states may exercise regarding stateless vessels. The predominant position seems to be that on the high seas, all states may exercise jurisdiction. As Guilfoyle explains, when one state boards another state's vessel with consent it is not borrowing the jurisdiction from the flag state. Rather,

> . . . the boarding state exercises its own enforcement jurisdiction, the immunity of the flag vessel from interference having been waived. *This implies an underlying concurrent jurisdiction of all states over the high seas: the consequence of it being a commons is that it is a space where all have jurisdiction, not where all have no jurisdiction* [emphasis added].[150]

According to Guilfoyle, there is no legal "black hole" on the high seas. Additionally, the jurisdiction any state may exercise is constrained by the competing interests or jurisdictions of other states.[151] Experts with this view assert that, ". . . a State does not have exclusive jurisdiction

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[150] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 342. H. Meyers at 320 agrees at least with this conclusion. He asserts that if no state claims the vessel as theirs, ". . . there is no rule of international law that forbids interference by the state most ready to take enforcement measures." At 321, he points out that, "A state taking action will do so by virtue of its own legal provisions."

[151] This principle is reflected in Article 87(2) of *UNCLOS*, that the freedoms states exercise on the high seas are "with due regard for the interests of other States."

over a ship because the vessel has its nationality; rather, but for such nationality, all other states would have jurisdiction as well."[152] An apparent difficulty with this position is that it alone cannot account for the concurrent jurisdiction a flag state would share with the coastal state over persons on board a vessel, when that vessel is located in the coastal state's territory.[153]

The competing position is that "freedom of the high seas means that the high seas are free from national jurisdiction."[154] Churchill and Lowe write ". . . no State can subject areas of the high seas to its sovereignty, *or indeed its jurisdiction* [emphasis added]. . . ." [155] The logical extension of this view is that the "ascription of nationality" to ships conveys flag state jurisdiction over a vessel on the high seas. Although not stated explicitly by Churchill and Lowe, this seems to be reflected in their assertion that, "As well as indicating what rights a ship enjoys and to what obligations it is subject, the nationality of a vessel indicates which State is to exercise flag State jurisdiction over the vessel."[156] O'Connell states, "A ship is a unique subject-matter of law . . . . it has the capacity to carry with it the law and jurisdiction of sovereigns."[157] Similarly, Natalie Klein, quoting the much cited *Lotus* case writes, "A vessel that flies the flag of a particular state is then assimilated to the territory of that state; 'what occurs on board a vessel

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[152] D. Caron, "Ships, nationality and status" in Bernhardt (ed,) *Encyclopaedia of Public International Law*, Vol. 4 (Amsterdam: North-Holland, 2000), 404. Cited by Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 296 who states that this view is also consistent with other experts, Gidel and Meyers.

[153] In such a situation it is clear there is concurrent jurisdiction. See D.P. O'Connell, 953. Craig Allen, 117. For example, Canada extends its criminal law over persons (not solely Canadians) on board Canadian flagged ships anywhere outside Canada. See section 477.1(c) of the *Criminal Code*.

[154] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2012), 151.

[155] Churchill and Lowe, 205.

[156] *Ibid*., 257.

[157] D.P. O'Connell, 747.

on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.'"[158]

Whether no state or all states may exercise jurisdiction on the high seas is not a settled area of law and the competing views are clearly incompatible. However, a limited reconciliation of the differing schools may be possible. It is conceivable that all states have jurisdiction on the high seas *and* that flagged vessels are assimilated to the territory of that state. This would account for the jurisdiction states continue to exercise over their vessels and the persons on board while that vessel is within another state's territory. It would also be consistent with the seemingly predominant view that some type of enforcement action against stateless vessels on the high seas is permitted. However, as will be discussed below, the views as to what action is permitted range widely. Some experts believe that the law only authorizes limited measures against stateless vessels for safeguarding the minimum public order at sea.[159] Others are of the opinion that stateless vessels can be seized simply on account of their statelessness and that the boarding state may exercise jurisdiction over all persons on board. This latter position reflects current U.S. law.[160]

United States Approach to Drugs on the High Seas

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[158] Natalie Klein, "The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," 296 quoting from *SS Lotus* at 25.

[159] Efthymios Papastavridis, "Interception of Human Beings on the High Seas: A Contemporary Analysis under International Law," *Syracuse Journal of International Law and Commerce* 36 (2009): 161.

[160] Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act." *University of Miami Law Review* 67 (2012): 273. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 17. *United States v Ibarguen-Mosquera* 634 F. 3d. 1370 at 1379 (Court of Appeals, 11th Circuit, 2011). *U.S. v Marino-Garcia*, 679 F.2d 1373 at 1382 (Court of Appeals, 11th Circuit, 1982). *United States v Cortes a Q*, 588 F.2d 106 at para 8 (Court of Appeals, 5th Circuit, 1979).

Given the long history of the U.S. courts' engagement in addressing the law of sea and stateless vessels, a brief review of the issues running through key cases is warranted, some of which have already been cited. U.S. jurisprudence is not of interest because it legally binds Canadian courts. Rather, it is of interest because of its potential persuasive power with them. In the past, the Supreme Court of Canada has used foreign case law to assess alternative positions to be considered, and to benefit from the wisdom and mistakes of other countries.[161] One expects that this trend would continue.

Indeed, former Supreme Court Justice LaForest remarked that Canadian courts have never been averse to using foreign materials and the use of these materials has deep roots in our connections with Britain and France. With regard to the *Charter* and human rights cases he states:

> The repeated use of American constitutional material, though undoubtedly the most extensive and rewarding, is simply an aspect of a more general trend. In dealing with cases involving human rights, we make frequent references to international instruments and their application both by international bodies and domestic courts in various countries. This is, in part, a reflection not only of the fact that the *Charter* and other human rights instruments were adopted against the background of the post-war international recognition of human rights throughout the globe but is also grounded in a belief in the value of comparative analysis. Thus, we frequently cite European sources with regard to both human rights and economic integration.[162]

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[161] Gerard V. La Forest, "The Use of American Precedents in Canadian Courts," *Maine Law Review* 46 (1994), last accessed 26 April 2014, https://mainepatent.org/academics/maine-law-review/pdf/vol46_2/vol46_me_l_rev_211.pdf . Rebecca Lefler, "A Comparison of Compassion: Use of Foreign Case Law as Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada and the High Court of Australia," *Southern California Interdisciplinary Law Journal* 11, (2001): 177.

[162] Gerard V. LaForest, "The Use of American Precedents in Canadian Courts," *Maine Law Review* 26 (1994): 216.

Should Canadian courts ever face the challenge of assessing CAF activities on board stateless vessels or in respect of the persons on these vessels, recourse could be made to American law, especially since this would be a relatively new area for the Canadian courts.[163]

Since 1970, the U.S. has been expanding the scope of its counter-narcotics activities on the high seas.[164] In 1970 a new statute, the *Comprehensive Drug Abuse Prevention and Control Act*, provided for the prosecution of possession of narcotics on the high seas if there was an intent to import them into the U.S.[165] A noteworthy case from this era is *U.S. v Cortes a Q*.[166] The Coast Guard boarded a vessel to verify its nationality and upon not being able to verify nationality from documents, proceeded to verify the main beam number of the vessel.[167] The Court first noted that the Coast Guard is entitled to search and seize any vessel on the high seas that is ". . . subject to the jurisdiction, or to the operation, of any law of the United States." The Court then found that this limited search of the vessel was in accordance with the law of the sea and ruled that ". . . stateless vessels are subject to this type of examination . . . [and] are 'subject to the jurisdiction . . . of the United States' for these limited purposes."[168] However, the Court also ruled:

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[163] *Ibid*., 213.

[164] *The Comprehensive Drug Abuse Prevention and Control Act* (1970), last accessed 1 April 2014, http://www.gpo.gov/fdsys/pkg/STATUTE-84/pdf/STATUTE-84-Pg1236.pdf. The *Marijuana on the High Seas Act*, Pub. L. No. 96-350, 94 Stat. 1159 (1980), http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg1159.pdf. *Maritime Drug Law Enforcement Act* (1986), now 46 U.S.C. Ch. 705 Maritime Drug Law Enforcement, last accessed 31 March 2014, http://uscode.house.gov/view.xhtml?path=/prelim@title46/subtitle7/chapter705&edition=prelim.

[165] Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act," 258. *Comprehensive Drug Abuse Prevention and Control Act* (1970), section 1009.

[166] *United States v Cortes a Q*, 588 F.2d 106 (Court of Appeals, 5th Circuit, 1979).

[167] The main beam number was a number assigned by national authorities to vessels. This has been replaced by the IMO scheme in 1987. See the IMO website for an explanation, last accessed 15 April 2014, http://www.imo.org/OurWork/Safety/Implementation/Pages/IMO-identification-number-scheme.aspx.

[168] The Court was referring to Article 22 of the *Convention on the High Seas* (1958) which addresses stateless vessels.

> Authority to search and seize the vessel under American or international standards does not mean that the Coast Guard actions were consistent with Fourth Amendments requirements . . . once aliens become subject to liability under United States law, they also have the right to benefit from its protection.

In this case, the evidence was admitted since its discovery resulted from a lawful boarding and a limited *bona fide* search to verify nationality. This same approach was followed in *United States v Egan.*[169] The Court acknowledged the difficulties of enforcing the law on the high seas while observing constitutional guarantees that have proved challenging, even for the Courts. The Court noted how this can be further complicated in twelve-foot swells when 150 miles offshore, ruling that:

> Nevertheless, if the arm of the Government can reach out over the Atlantic to seize the *Jose Gregario*, a stateless vessel manned by seven Colombian crew members and two United States citizens as this court has recently held, so also do the rights assured by the Constitution extend to possible law enforcement abuses on the high seas.

Other federal courts also extended Fourth Amendment rights to aliens subjected to U.S. government action outside the U.S.[170] This has also occurred specifically in regard to foreign citizens on the high seas on stateless vessels.[171]

However, this approach changed after the Supreme Court case of *United States v Vedugo-Urquidez.*[172] This case addressed a search in Mexico of a Mexican national's property and ruled that the Fourth Amendment does not apply. This case was purportedly followed in *United States*

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[169] *United States v Egan*, 501 F. Supp 1252 (S.D.N.Y. 1980).

[170] Mary Lynn Nicholas, "United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment," *Fordham International Law Journal* 12, no. 1 (1990): 277.

[171] *United States v Miguel Saiz Monroy* 614 F.2d 61 (Court of Appeals, 5th Circuit, 1980). *United States v Marino Garcia*, 679 F.2d 1373 (Court of Appeals, 11th, 1982). See also, *United States v Demanett* 629 F.2d 862, 866 (3rd Circuit, 1980), *cert. denied* although this may have been a U.S. vessel. For a discussion of search and seizure see, Greg Shelton, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?* William and Mary Law Review 34, no. 3 (1993), last accessed 12 April 2014, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1859&context=wmlr.

[172] 494 U.S. 259 (1990).

v. Alfre Luis Bravo in 2007. There, the Court ruled the Fourth Amendment did not apply to the search of a non-resident alien on a stateless ship in international waters.[173] However, the reliance on *Vedugo-Urquidez* for this finding could be questioned. The last paragraph of *Vedugo-Urquidez* reads:

> For better or worse, we live in a world of nation-states in which our Government must be able to 'function effectively in the company of sovereign states.' [reference omitted] Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country.

The reliance of the Court in *Alfre Luis Bravo* on the Supreme Court decision regarding Mexico was not necessarily incorrect. Yet, as should be clear from the discussion above, the issue of jurisdiction on the high seas and in particular over stateless vessels is of a unique nature. Extrapolating legal principles from a case of foreign government action *in another sovereign state* to action taken by a state in respect of a stateless vessel on the high seas must occur with caution.[174]

A second theme running through U.S. jurisprudence relates to jurisdiction over the vessel and jurisdiction over the persons on board. The current predominant view is that since the U.S. has jurisdiction over stateless vessels in accordance with domestic law, it also has jurisdiction over the persons on board.[175] This is likely because U.S. legislation now asserts jurisdiction over persons on stateless vessels outside the U.S.[176] The *Drug Trafficking Vessel Interdiction Act* goes

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[173] 489 F.3d 1 (Court of Appeals, 1st Circuit, 2007). Although the Court simply referred to a "ship in international waters," this vessel was also stateless.

[174] This same issue arguably arises regarding the application of the Canadian *Charter*.

[175] Meaning the vessel is seized, and the crew can be prosecuted. *United States v Gonzalez*, 311 F.3d 440 (Court of Appeals, 1st Circuit, 2002). *United States v Alfre Luis Bravo*, 489 F. 3d 1 (Court of Appeals, 1st Circuit, 2007).

[176] See 46 U.S.C. Ch. 705 *Maritime Drug Law Enforcement* § 70502 and 70503. This *Act* from 1986 defines a U.S. vessel to include stateless vessels, as was done in earlier legislation. But, it also makes it an offence for anyone in any place to possess a controlled substance on board a U.S. vessel. Similarly, the *U.S. Commander's Handbook on the Law of Naval Operations* states that, ". . . stateless vessels may be boarded upon being

so far as to make it an offence to be in a stateless submersible or semi-submersible on the high seas.[177] The case law prior to these statutes is of more interest.

The *Marijuana on the High Seas Act* which entered into force in 1980 provided that a ". . . 'vessel subject to the jurisdiction of the United States' includes a vessel without nationality, or a vessel assimilated to a vessel without nationality in accordance with paragraph (2) of article 6 of the *Convention on the High Seas*, 1958."[178] But, it did not assert jurisdiction over non-citizens on board stateless vessels outside the U.S., at least not explicitly. In absence of such a provision, the courts resorted to international law.

An often cited case that considered this *Act* is *United States v James Robinson.*[179] The case involved a stateless vessel boarded on the high seas; there was no allegation or evidence that the drugs it was carrying were to be imported into the U.S. The Court analysed the relatively new *Marijuana on the High Seas Act* and reviewed its drafting history including a Justice Department memo addressing jurisdiction. The Court concluded that Congress did not intend to reject the application of the law of nations, that is, international law, in enacting this statute. The Court noted:

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encountered in international waters . . . and subjected to all appropriate law enforcement action." (July 2007) Para 3.11.2.3.

[177] The *Drug Trafficking Vessel Interdiction Act* (2008), 18 U.S.C. Ch. 111, §2285, http://uscode.house.gov/view.xhtml?req=(title:18 section:2285 edition:prelim) OR (granuleid:USC-prelim-title18-section2285)&f=treesort&edition=prelim&num=0&jumpTo=true. The *Drug Trafficking Vessel Interdiction Act* built on legislation from 1980 onward that asserted U.S. jurisdiction over stateless vessels on high seas. See Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act," 257. In addition to the *Marijuana on the High Seas Act* (1980), there was also the *Maritime Drug Law Enforcement Act* (1986), now 46 U.S.C. Ch. 705 *Maritime Drug Law Enforcement*, last accessed 31 March 2014, http://uscode.house.gov/view.xhtml?path=/prelim@title46/subtitle7/chapter705&edition=prelim.
See also, Allyson Bennett, "That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act," *The Yale Journal of International Law* 37, (2013): 448-449.

[178] *Marijuana on the High Seas Act* (1980), Public Law 96-350, 96th Congress, last accessed 8 April 2014, http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg1159.pdf .

[179] 515 F.Supp. 1340 (1981).

> 'While any nation may extend its authority over a stateless *ship*' H. Meyer [sic], The Nationality of Ships, 323 (1967), the issue before the Court is not of such an *in rem* nature. Rather, the issue is whether the U.S. may extend its authority over the foreign citizen *crewmembers* [emphasis in original] of such a stateless ship.

Rather than equating jurisdiction over the vessel with jurisdiction over the crew, the Court held that, since the vessel was outside the territory of the U.S., jurisdiction over the crew must be based on one of the principles of extraterritorial jurisdiction, as addressed above. The Court determined that the only principle potentially relevant was the protective principle.[180] In the absence of evidence of an intention to import the drugs into the U.S., the Court found that the issue ". . . boils down to whether, as a matter of law, the presence of foreign crewmen on a stateless ship carrying marijuana on the high seas 400 miles from the United States by definition represents a threat to our national security and government function." The Court ruled that it did not.

The former case touches upon the third and related theme running through U.S. jurisprudence. In applying the earlier statutes asserting U.S. criminal jurisdiction on stateless vessels on the high seas, the courts usually required a nexus between the vessel and the U.S in order to rely on the protective or objective territoriality principles. The Courts took this approach in *United States v Angola* and *United States v. Egan.*[181] In *Angola*, the Court noted that, in accordance with U.S. law, the stateless vessel was subject to the jurisdiction of the U.S. Yet, the Court did not proceed to rule on jurisdiction over the crew on this basis. Rather, the Court noted that the vessel, which was likely a "mother-ship," was seized near the Florida coast in a position

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[180] See pages 26-27, a state may assert extraterritorial prescriptive jurisdiction over matters that threaten vital national interests.

[181] *United States v Angola* 514 F. Supp. 933 (District Court, 1981). The same approach was followed in *United States v. Egan* 501 F. Supp 1252 (S.D.N.Y. 1980) "While the statelessness of the [vessel] *Jose Gregorio* does not affect the subject matter jurisdiction of this court [over the defendants], it obviates the need to assess the effect of any international treaty upon the seizure in question."

known to be a stopping point for marijuana on its way into the U.S. [182] The Court cited the protective principle of jurisdiction and concluded that, although it was not certain of an intent to smuggle drugs into the U.S., "The [ship's] activity had an inherent and necessary effect threatening the United States with the eventual flow of drugs into this country." Therefore, the Court concluded that there was a sufficient nexus between the crime and the U.S. to justify the assertion of jurisdiction. The Court added that ". . . this was not a case where a stateless vessel was stopped half way around the world in the Gulf of Siam."[183]

There are U.S. cases asserting that drug trafficking is a crime of universal jurisdiction.[184] This assertion has been used to support the U.S. interdiction of stateless vessels on the high seas and the prosecution of non-nationals who are on board these vessels. However, this position has not been without controversy. In late 2012, the U.S. Court of Appeals (11th Circuit) in *US v Yimmi Bellaizac-Hurtado*, decided that drug trafficking was not contrary to "the law of nations."[185] The Court discussed the rules regarding the formation of customary international law and contrasted the regime created by the 1988 *UN Narcotics Convention* with the crime of genocide that provides for international tribunals.[186] The Court noted that even if the principles of the *UN Narcotics Convention* reflect customary international law, this *Convention* ". . . relied

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[182] That is to say, the drugs would be off-loaded into smaller vessels for transport into the U.S.

[183] Now called the Gulf of Thailand, which is about 1000 km further from Canada than the area of CTF-150 operations.

[184] Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act," 272.

[185] Case 11-14049, (Court of Appeals, 11th Circuit, 2012), last accessed, 3 April 2014, http://www.ca11.uscourts.gov/opinions/ops/201114049.pdf. This was relevant since the Constitutional basis for the relevant portion of *Maritime Drug Enforcement Act* was the power of Congress to define and punish offences against the law of nations. The Court noted that the "law of nations" now means customary international law.

[186] The impetus for the creation of the International Criminal Court was the suggestion of an international court for drug trafficking. However, in the final agreed "Rome Statute," in order to reach an acceptable compromise among states, drug offences were not included. See Antonio Cassese, *Cassese's International Criminal Law* 3rd ed. (Oxford: Oxford University Press, 2013), 262-263.

on domestic enforcement mechanisms to combat drug trafficking and prohibited State parties from interfering in the domestic enforcement efforts of other State parties." The Court stated, ". . . uniform condemnation and criminalization does not make something an international crime. Murder and rape, and indeed most *malum in se* offenses, are also universally condemned, and fall outside of international law." Douglas Guilfoyle, blogging on this case, writes:

> As a matter of US Constitutional law, it held the phrase 'law of nations' to be limited to customary international law. While historically US courts have been prepared to accept that drug smuggling is a crime at customary international law based on its universal condemnation and relevant treaty practice – it's always been a thin argument. I think it would be very hard to come up with much State practice (outside the US at least) involving narcotics prosecutions lacking any ordinary jurisdictional nexus with the prosecuting State. So, on the narrow question it posed itself, I'd say the 11th Circuit is right.[187]

It remains to be seen whether this approach towards universal jurisdiction will continue in the U.S. Even if this case is an anomaly, it and the others demonstrate that despite a robust statutory regime granting jurisdiction over stateless vessels and the persons on them, the U.S. courts, at least on occasion, look to international law for guidance. Additionally, perhaps because of the broad reaching nature of the legislation, some Courts have extended some Constitutional protections to those who were the subject of enforcement action. Finally, especially prior to the current legislation, U.S. courts looked for a nexus or threat to the U.S. before enforcing the law against the crew. To some extent, a nexus may be presumed based on a vessel's location. Enforcement action has occurred as much as 700 miles from the U.S. shores, yet it is hard to presume a nexus if the vessel is interdicted "half way around the world in the Gulf of Siam."

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[187] Douglas Guilfoyle, "Drug trafficking at sea: no longer a crime of universal jurisdiction before US Courts?" EJIL: *Talk* Blog 22 November 2012, last accessed 5 May 2014, http://www.ejiltalk.org/drug-trafficking-at-sea-no-longer-a-crime-of-universal-jurisdiction-before-us-courts/. Contra, Ian Brownlie, *Principles of Public International Law* 7th ed. (Oxford: Oxford University Press, 2008), 306 who states, "…offences related to traffic in narcotics are probably subject to universal jurisdiction." However, this assertion is not repeated in the 8th edition of this text in 2012.

Jurisdiction Over the Vessel, the Cargo and Persons On Board

From the discussion above it may be apparent that the law relating to counter-narcotics interdictions against stateless vessels, their cargo and crew is far from settled. As unacceptable as stateless vessels and legal vacuums may be, if states' enforcement powers are in fact limited, the enforcement action taken by Canada would be unlawful unless there was a recognized nexus between Canada and the interdicted vessel, the crew, or their activities that would satisfy one of the principles of extraterritorial jurisdiction.[188]

Meyers assesses that there are three possibilities regarding which, if any, state has the rights to take enforcement action against a stateless vessel: ". . . potentially any state has this power, . . . no state may have this power, . . . [or] only the state which has the closest connection with the ship may assume the power described."[189] This question is further complicated by differing views as to whether states can seize such vessels simply based on their statelessness, or just extend domestic law over the vessel.

The predominant U.S. view, and perhaps to a lesser extent that of the UK, is that prescriptive jurisdiction extends to stateless vessels, because they are *hostes humani generis* or "international pariahs." As such, they enjoy the protection of no state and may be seized by any state.[190] This approach regarding seizure has been described as "extreme" but it has also been

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[188] This is not referring to the right of visit in accordance with *UNLCOS*.

[189] H. Meyers, 319.

[190] Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act," 273. *United States v Ibarguen-Mosquera* 634 F. 3d. 1370 at 1379 (11th Circuit, 2011). *U.S. v Marino-Garcia*, 679 F.2d 1373 at 1382 (1982).

argued to be consistent with international law as set out in the often cited 1948 British case of *Molvan v A.G. for Palestine*.[191]

This case is often asserted as authority for the position that states have very broad jurisdiction over stateless vessels.[192] A vessel, which was later discovered to be stateless, was transporting illegal immigrants into Palestine. A British warship boarded her in international waters and escorted her to Palestine where she was ordered to be forfeited. The Turkish owner of the vessel appealed, arguing that the relevant Ordinance on migration was not in compliance with international law since he was not Palestinian and, at the time of interdiction, the vessel was not in Palestinian territory. The Court, in ruling against him, quoted with approval a passage from Oppenheim's *International Law*: "In the interest of order on the open seas, a vessel not sailing under the maritime flag of a State enjoys no protection whatsoever, for the freedom of navigation on the open sea is freedom for [vessels that sail under the flag of a State.]"[193] The Court concluded that the vessel in question ". . . could not claim the protection of any State, nor could any State claim that any principle of international law was broken by her seizure."

The Court's finding that the vessel was without protection is not controversial. Yet this case does not necessarily stand for the proposition that stateless vessels can be seized and forfeited solely on grounds of their statelessness. The Ordinance in question provided that a vessel used by a master, owner or agent to commit an offence shall be forfeited to the

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[191] Myres S. McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, (New Haven: New Haven Press, 1985), 1084-1085 describe the approach in *Molvan* as extreme. *Naim Molvan v A.G. for Palestine*, [1948] AC 531, last accessed 25 November 2013, http://www.refworld.org/docid/3ae6b6544.html. Lawrence Bruce Mandala, "Drug Enforcement in the High Seas: Stateless Vessel Jurisdiction Over Shipboard Criminality by Non-Resident Alien Crewmember – United States v. Alvarez-Mena," *The Maritime Lawyer* 11 (1986):173. The author refers to the U.S. courts' reliance on *Molvan*.

[192] Usually, those asserting this position do not distinguish between jurisdiction over the vessel, the cargo, or the persons on board.

[193] *Naim Molvan v A.G. for Palestine*, [1948] AC 531, last accessed 25 November 2013, http://www.refworld.org/docid/3ae6b6544.html.

Government. So, the vessel's statelessness may have allowed the initial interdiction, but the forfeiture depended on the vessel being used in the commission of an offence.

This reading of *Molvan* is consistent with a more moderate approach towards stateless vessels. Namely, that they are subject to the jurisdiction of all nations but not necessarily subject to seizure solely on the basis of statelessness, some other impugned conduct is required.[194] Norway is said to be evidence of state practice of this approach in that it extends domestic law to assert jurisdiction over stateless vessels.[195] This approach is preferred by those authors such as Guilfoyle who assert that the high seas are subject to concurrent jurisdiction, of all states, rather than the jurisdiction of no state.[196] Thus, "Jurisdiction over a stateless vessel . . . flows from the nature of the high seas regime . . . ."[197]

A more nuanced approach is suggested by Papastavridis, that is, the law only permits a boarding state to enforce matters related to sea worthiness and relevant international regulations that the flag state would enforce on its own vessels, such as those obligations related to the vessel in Article 94 of *UNLCOS*. He asserts that this is in keeping with the *ratio juris* of Article

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[194] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 341.

[195] Allyson Bennett, "That Sinking Feeling, Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act," 444, 460. Norway has taken this action in respect of fishing vessels. However, because of the negative effect of over fishing on Norway, this is arguably not an assertion of "universal jurisdiction;" the crime has a connection with Norway. Yet, the fact remains, persons on board are subject to Norwegian prescriptive and enforcement jurisdiction.

[196] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 342.

[197] D. Caron, "Ships, nationality and status" in Bernhardt (ed,) *Encyclopaedia of Public International Law*, Vol. 4 (Amsterdam: North-Holland, 2000), 404. Guilfoyle cites this passage with approval at Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 296 and adds that this view is also consistent with G. Gidel, *Le droit international public de la mer*, (Paris: 1932) and H. Meyers 318-321. See also, Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea*, 341-342 and Andrew Anderson, "Jurisdiction of Stateless Vessels on the High Seas: an Appraisal Under Domestic and International Law," *Journal of Maritime Law and Commerce* 13, no.3 (April 1982): 336. It should be noted that ". . . there is a classical controversy as to whether the high seas should be regarded as *res nullis* (nobody's thing) or *res communis* (thing of the entire community). Yet, these Latin words seem to have been given a meaning different from the original meaning in Roman law and, consequently, created unnecessary confusion . . . . and should therefore be avoided " since they are of limited value given the modern developments regarding the law of the sea. Yoshifumi Tanaka, *The International Law of the Sea*,150, note 2.

110(1)(d) of *UNCLOS*, ". . . it is dangerous to have ships sailing the high seas which . . . need not comply with any generally accepted international regulations to ensure the minimum public order at sea."[198] On this analysis, threats to the minimum public order include, inadequate seaworthiness, inadequate crew training or a lack of equipment to prevent collisions.[199] He asserts that the stateless vessel could be taken into port to enforce compliance on *the vessel*.[200]

Finally, there is a very restricted view of jurisdiction over stateless vessels, which holds that some further jurisdictional nexus or permissive rule of international law is required to justify their seizure or any other exercise of enforcement jurisdiction. This view is popular with those such as Churchill and Lowe who believe that no state can subject the high seas to its jurisdiction.[201] Indeed, Guilfoyle cites Churchill and Lowe as a "contrasting view." They argue that:

> . . . statelessness will not, of itself, entitle each and every State to assert jurisdiction over the [vessel] for there is not in every case any recognized basis upon which jurisdiction over stateless ships could be asserted on the high seas . . . . On the other hand it has been held, for example in the case of *Molvan v. A.G. for Palestine*, . . . that such ships enjoy the protection of no State . . . . Widely accepted as this view is it ignores that possibility of diplomatic protection being exercised by the national State of the individuals on the stateless ship. The better view appears to be that there is a need for some jurisdictional nexus in order that a State may extend its laws to those on board a stateless ship and enforce those laws against them. [202]

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[198] Efthymios Papastavridis, "Interception of Human Beings on the High Seas . . . ," 161.

[199] *UNCLOS*, Article 94.

[200] Efthymios Papastavridis, "Interception of Human Beings on the High Seas . . . ," 161-162. This is supported by H. Meyers at 318 and 323.

[201] For example, Churchill and Lowe, 205. See also, Ann Marie Brodarick, "High Seas, High Stakes: Jurisdiction over Stateless Vessels and an Excess of Congressional Power Under the Drug Trafficking Vessel Interdiction Act," 270-271. Pieter Johannes Jacobus van der Kruit, "Maritime Drug Interdiction in International Law," 82.

[202] Churchill and Lowe, 214. See also Craig Allen, 152. In keeping with this requirement for a "nexus," Joseph Brendel, citing H. Meyers, asserts, "Any nation may treat a stateless vessel as a vessel registered in that nation, but only if the vessel meets the registration requirements of that nation and only if the nation maintains a genuine link between the nation and vessel . . .", as is required by Article 91 of *UNCLOS*. He adds that, "A nation that is unwilling or unable to register a vessel cannot exercise *exclusive* [emphasis added] jurisdiction over that vessel." Joseph Brendel, "Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels," *William and*

Churchill and Lowe appear to be arguing that stateless vessels are really not "without protection" but rather, states need some nexus to assert jurisdiction over them. But, it is also possible that they are assuming either, the ship and those on board must be treated together as a unit, or that jurisdiction over the vessel leads to automatic jurisdiction over those on board. If they have made one of these assumptions, their concern would arise because a state asserting jurisdiction over the stateless vessel would also assume lawful jurisdiction over the crew, which would run counter to the limited recognized bases of extraterritorial jurisdiction. This conclusion suggests that jurisdiction over the vessel and jurisdiction over the crew should be addressed separately.

Even if states have broad powers to assert jurisdiction over a *stateless vessel*, it is at least arguable that this does not lead to jurisdiction over those on board. O'Connell, in his respected work on the law of the sea, asserts that jurisdiction over persons on the high seas is established in accordance with international law and such an assertion must be based on personal jurisdiction over nationals or on protective jurisdiction.[203] In keeping with this approach, Craig Allen states, "In analysing jurisdiction in any given case one must distinguish jurisdiction over the vessel (*in rem*) from jurisdiction over the persons on board the vessel (*in personam*)."[204] Papastavridis is of

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Mary Law Review 25, no.2 (1983): 333. H. Meyers at 318 does indeed support this proposition but confirms this ability to register the vessel is relevant to "exclusive jurisdiction," that is, for a state to consider the ship "as its own." Presumably, at least for Meyers, this comprehensive assertion of jurisdiction is different from the limited assertion of jurisdiction that he sees all states as able to assume. Although he was writing before *UNCLOS*, his view seems to be consistent with need for genuine link between the vessel and the flag state if the broad obligations of flag states at Article 94 of *UNCLOS* are to be met. Article 94 of *UNCLOS* requires states to ". . . effectively exercise [their] jurisdiction and control over administrative, technical and social matters of ships flying [their] flag." See also, *M/V Saiga (No.2) Case (Saint Vincent and the Grenadines v. Guinea)* International Tribunal for the Law of the Sea (1 July 1999) at para 83, last accessed 3 April 2014, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf.

[203] D.P. O'Connell, 935.

[204] Craig Allen ,108. Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 251 citing a case from the Italian Court of Appeal. He states that the Italian legislation applied in respect of the cargo (*in rem*), but not in respect of the persons on board (*in personam*). In addressing migrant smuggling and refugees on the high seas, Maarten den Heijer writes, ". . . the Law of the Sea sets the circumstances under which states may take particular action over migrant vessels, it does not answer the question of what action may subsequently be taken

the view that states need to rely on some positive basis to assert jurisdiction over persons and property on these vessels, statelessness alone is not sufficient. He writes, ". . . the right to visit stateless vessels does not *ipso jure* entail the right to seize illicit cargo or exert further enforcement jurisdiction over persons on board the vessel." [205]

Additionally, even if a state asserts jurisdiction over the vessel, an assertion of jurisdiction for all purposes, that is, assimilating that vessel to the boarding state is generally not supported.[206] If the stateless vessel were to be assimilated for all purposes, it would be granting the boarding state jurisdiction over all and everything on board; it would, at least be akin to, making it a vessel of that state.[207]

In *Molvan*, the decision regarding the seizure of the vessel does not necessarily support the conclusion that the Court assumed jurisdiction over those on board based on the vessel's statelessness. In addressing the application of the law to the persons on board, the Court found that, ". . . the persons were on board the vessel within the territorial waters of Palestine in circumstances in which the master, owner or agent of the vessel was deemed to have abetted the unlawful immigration of those persons." With regard to the owner, master or agent, the defence challenged that the Ordinance was contrary to international law because it purports to penalize

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against the migrants themselves." He concludes that the answer to this question is based in international human rights law and the domestic law of the boarding state. Maarten den Heijer, "Europe and Extraterritorial Asylum," (Ph.D. thesis, Leiden University, 2011), 252, last accessed 10 March 2014, https://openaccess.leidenuniv.nl/handle/1887/16699. Other authors share this view: Patrick Sorek, "Jurisdiction over Drug Smuggling on the High Seas: It's a Small World After All," *University of Pittsburgh Law Review* 44 (1982-1093): 1107. Joseph Brendel, "Marijuana on the High Seas and Jurisdiction over Stateless Vessels," 333. Laura L. Roos, "Stateless Vessels and the High Seas Narcotics Trade: United States Courts Deviate from International Principles of Jurisdiction," *The Maritime Lawyer* 9 (1984).

[205] Efthymios Papastavridis, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas," 588. Efthymios Papastavridis, "Interception of Human Beings on the High Seas . . . ," 162.

[206] Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 265-266.

[207] Lawrence Bruce Mandala, "Drug Enforcement in the High Seas: Stateless Vessel Jurisdiction Over Shipboard Criminality by Non-Resident Alien Crewmember – United States v. Alvarez-Mena," *The Maritime Lawyer* 11 (1986):176-177. See note 202.

persons who are neither resident in, nor citizens of, Palestine. The Court upheld the Ordinance and rejected the challenge:

> [the Ordinance] purports to penalize persons who are neither Palestinian subjects nor resident in Palestine. It is necessary, however, to examine more closely what is the act in respect of which a penalty is to be imposed. *The offence itself can only take place in Palestinian territory, for it consists in the unlawful entry into that territory* [emphasis added]. But it can be abetted by, and can hardly take place without the abetment of, those who are outside the territory. Accordingly, abetment of the offence is itself made punishable . . . . Their Lordships have not been referred to any decision nor to any text-book of authority which suggests that the enactment by a State of a penalty so expedient, if not essential, *for the purpose of preventing an unlawful invasion of its territory*, [emphasis added] is contrary to any established principle of international law.

Indeed, the Court focused on the connection of the offence with the territory, and the security, of Palestine. In effect, the Court relied on the territorial and protective principles of jurisdiction. It did not purport to exercise universal jurisdiction over the persons on the vessel based on its statelessness and then extend this jurisdiction to the owner, agent or master as accessories.[208]

Finally, in discussing flag state obligations, *UNCLOS* seems to draw a distinction between jurisdiction concerning the ship, and concerning those on board. Article 94(1) (b) of *UNCLOS* provides that every flag state ". . . shall assume jurisdiction under its internal law over each ship flying its flag and its master, its officers and crew in respect of administrative, technical and social matters concerning the ship." The *Commentary* to this paragraph states that

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[208] This is not the view of Douglas Guilfoyle who believes that *Molvan* ". . . stands for the proposition that in the absence of a claim of nationality, a State may assert jurisdiction over the vessel, crew and people on board – though that does not preclude the possibility of claims of diplomatic protection being brought by the state of nationality of either any natural persons detained or the owners of the cargo." "Personal communication with Douglas Guilfoyle," (27 March 2014). In any event, and even if Guilfoyle is correct, there was an undeniable nexus between the actions of the vessel including those on board, and the Palestinian territory, such that this could not be regarded as universal jurisdiction in its true sense.

it addresses ". . . *not so much matters 'concerning the ship' as* concerning the activities on the ship, or more accurately, *the persons on the ship* [emphasis added]."[209]

Unfortunately, the authors who see jurisdiction over the vessel and jurisdiction over the persons on board as distinct do not always explain the basis for their views, but there would seem to be at least two possibilities. First, to allow a state to assert exclusive jurisdiction over the vessel and those on board would be for that state to treat that vessel as if it carried its flag. As Meyers asserts, the conditions of registration need to be met, including a genuine link between the vessel and state for this to occur. Second, if jurisdiction over the crew and the vessel are not separated, there are two possible results, neither of which is consistent with the principles of international law. One possible result is the establishment of a new type of universal jurisdiction for all those on board stateless vessels, and as one author argues, "Crewmembers . . . do not expose themselves to universal jurisdiction simply because they choose to sail on a stateless vessel."[210] The second alternative result is that a stateless vessel, is in effect, cloaked in the protection of its crew unless a state can establish some jurisdictional nexus with the ship or with those on board under the principles of extraterritorial jurisdiction. This result runs contrary to the widely accepted view that stateless *vessels* are without protection.

On the contrary, it is arguable that jurisdiction over the vessel and the persons on board are one in the same, namely the ship is "a unit." This is the view of Guilfoyle and the predominant approach in recent U.S. cases.[211] Guilfoyle asserts that the International Tribunal

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[209] *United Nations Convention on the Law of the Sea 1982: Commentary* Vol. 3, at 146. The *Commentary* also provides that, "By necessary extension [it] applies to all persons on board a ship, whether legally or not (e.g. stowaways)."

[210] Joseph Brendel, "Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels," 339. Patrick Sorek, "Jurisdiction Over Drug Smuggling on the High Seas," 1108.

[211] However, as discussed, this approach is now enacted into U.S. statute law so recent jurisprudence is not necessarily reflective of the Courts' understanding of international law on this issue.

for the Law of the Sea took this approach in the *M/V Saiga* and *Arctic Sunrise* cases.[212] While it is true that the Tribunal did not distinguish between jurisdiction over the ship and persons, the issue was not specifically addressed nor disputed. Additionally, the impugned activities occurred in the contiguous zone, and the exclusive economic zone and the safety zone of an oil rig, respectively.[213] It is arguable therefore that the purported jurisdiction exercised by the coastal states arose from both the ship, and the persons on board, being in the same zone. In these zones, in accordance with *UNCLOS*, the coastal states have a limited right to exercise some control and to enforce their laws. Such is not the case on the high seas where the basis for the exercise of jurisdiction over stateless vessels and the persons on board is not so settled.

Conclusion Regarding Law of the Sea

In conclusion, the European Court of Human Rights may have determined why there is so little consensus amongst experts and lack of specifics in the relevant treaties:

> . . . although the purpose of the Montego Bay Convention [*UNCLOS*] was, *inter alia*, to codify or consolidate the customary law of the sea, its provisions concerning illicit traffic in narcotic drugs on the high seas – like those of the complementary Vienna Convention [*UN Narcotics Convention*], organising international cooperation without making it mandatory – reflect a lack of consensus and of clear, agreed rules and practices in the matter at the international level.[214]

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[212] "Personal communication with Douglas Guilfoyle," (24 March 2014).

[213] *The "Arctic Sunrise" Case (Kingdom of the Netherlands v Russian Federation*), International Tribunal for the Law of the Sea (22 November 2013), last accessed 1 April 2014, http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf. Douglas Guilfoyle, "Greenpeace 'Pirates' and the MV Arctic Sunrise," *EJIL: Talk!* Blog (8 October 2013), last accessed 3 April 2014, http://www.ejiltalk.org/greenpeace-pirates-and-the-mv-arctic-sunrise/. In *M/V Saiga* it was unclear whether Guinea was relying on the contiguous zone or laws in relation to its exclusive economic zone. *The M/V "Saiga" (No.2) Case (Saint Vincent and the Grenadines v. Guinea)* International Tribunal for the Law of the Sea (1 July 1999) last accessed 3 April 2014, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf.

[214] *Medvedyev and Others v France* (2010), 28.

In absence of such clarity, what can states do to ensure compliance with the law of the sea and to not exceed the prescriptive and enforcement jurisdiction that international law permits?[215] The first step is of course for a boarding state, prior to taking any additional action, to determine that the vessel actually *is* stateless. As discussed, especially for smaller vessels, a lack of registration does not equate with a lack of nationality.

As to the nature of stateless vessels, there is consensus that they are without protection, presumably therefore states should be able to exercise prescriptive and enforcement jurisdiction over them.[216] The predominant view seems to be that there is such a right, although some may assert that a national nexus is required,[217] or that jurisdiction is only permitted for some limited purpose such as maintaining public order on the high seas.[218]

These more cautious views are not without a basis. The lack of any enforcement jurisdiction in *UNCLOS* in respect of stateless vessels is in stark contrast with Article 105 and the universal jurisdiction given over piracy that includes the right to seize a pirate vessel and its cargo.[219] This lack of explicit enforcement jurisdiction is perhaps not surprising since it is by control of their territorial waters and ports that states, in practice, clear the high seas of stateless vessels.[220] From statements made by the Minister of National Defence, one of Canada's concerns

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[215] To clarify, the right of states to visit vessels in accordance with Article 110(1)(d) of *UNCLOS* is not disputed; it is actions beyond this that pose the challenge.

[216] Myres S. McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, (New Haven: New Haven Press, 1985), 1084-1085.

[217] Such as Churchill and Lowe.

[218] As seems to be the view of Efthymios Papastavridis.

[219] Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge, Cambridge University Press, 2012), 162.

[220] Myres S. McDougal and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, (New Haven: New Haven Press, 1985), 1085. H. Meyers, 323. This approach may not be effective entirely in respect of stateless "mother-ship" in international waters that distributes its illicit cargo to smaller boats for transport ashore at night. See Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 79.

seems to be ridding this region of illicit maritime activities.[221] If coastal states barred these allegedly stateless vessels from their waters, this could be accomplished.

Regarding seizure of stateless vessels on the high seas solely on the basis of statelessness, Guilfoyle states, "If the right was uncontroversial, its omission from *UNCLOS* and the *UN Narcotics Convention* would be difficult to understand."[222] Furthermore, despite U.S. law to the contrary, Meyers asserts, that statelessness *per se* is not unlawful in international law, just highly undesirable.[223]

As for asserting jurisdiction over those on board, even though narcotics are nearly universally unlawful, possession and trafficking are *not* a crime of universal jurisdiction. Outside the U.S and Spain, there is no indication of state practice sufficient to substantiate such a profound development in customary international law.[224] Even in these two cases, in practice, it is not universal jurisdiction in the true sense. Interdictions seem to be reasonably aimed at preventing drugs from entering the state in question. Similarly, Canada has asserted that interdiction of these vessels is keeping drugs off Canadian streets. If Canada could demonstrate this adequately, the protective principle of jurisdiction may apply, if Canada could *also* establish that the drugs threaten a "vital national interest."[225] Also, a link between terrorist groups and drug trafficking may support the use of the protective principle. Yet, as with drugs on Canadian

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[221] "HMCS Regina Disrupts Narcotics Shipment At Sea," 3 April 2014, website Government of Canada News Releases, last accessed 25 April 2014, http://news.gc.ca/web/article-en.do?mthd=index&crtr.page=1&nid=835049.

[222] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 18.

[223] H. Meyers, 317. Also, Joseph Brendel, "The Marijuana on the High Seas Act and Jurisdiction over Stateless Vessels," 332. David D. Caron, "Ships, Nationality and Status," at 404 in R. Bernhardt ed., *Encyclopaedia of Public International Law* Vol. 4 (Amsterdam: North Holland, 2000).

[224] Dr. Vicenta Carreno Gualde, "Suppression of the Illicit Traffic in Narcotic Drugs and Psychotropic Substances on the High Seas: Spanish Case Law," *Spanish Yearbook of International Law* 4 (1995-1996): note 40.

[225] Arguably, the objective territoriality principle could also apply but this would likely require using the more expansive and controversial interpretation used by the U.S.

streets, it would fall upon Canada to establish on a case-by-case basis the link between the drugs, the terrorist groups, and a threat to Canada. Presumably, this would be difficult to do. Additionally, Canada may be unwilling to divulge the source of the information or intelligence about the interdicted vessel in open court, just as it has been reluctant to do in other terrorism related cases.[226] Regarding purported enforcement jurisdiction, its exercise could lead to the state of nationality of the crewmember protesting since the vessel is stateless, not the persons on board.[227] Such enforcement action could also lead to a legal challenge of the lawfulness of the prescriptive jurisdiction, and of the domestic legal basis. Based on some U.S. jurisprudence, in the absence of solid evidence, an exercise of enforcement jurisdiction on the other side of the world would stretch the protective principle to its limits.

There is very little discussion in any source regarding jurisdiction over cargo other than some assertions that jurisdiction over a stateless vessel should not automatically mean jurisdiction over cargo. While this proposition may generally be valid, it could be reversed for a cargo that is nearly universally unlawful. As discussed, states could not reach a consensus as to what action is permitted against stateless vessels trafficking in narcotics. Given this lack of consensus, the course of action that presents the least legal risk, other than doing nothing, is asserting jurisdiction solely over the nearly universally unlawful cargo, versus asserting

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[226] For example see Kent Roach, "When Secret Intelligence Becomes Evidence: Some Implications of Khadr and Charkaoui II," *Supreme Court Law Review* 2nd 47 (2009).

[227] David D. Caron, "Ships, Nationality and status" in Bernhardt ed., *Encyclopaedia of Public International Law*, Vol. 4 (Amsterdam: North-Holland, 2000) 404. "Although the vessel may be without . . . a nationality, the owners of the cargo, the master and the crew are likely to be nationals of some State and thereby derive some measure of protection from arbitrary treatment. The lack of State practice expressly supporting a right to such protection may reflect merely the fact that statelessness of late arises almost exclusively on the context of drug trafficking."

jurisdiction over the vessel or persons on board.[228] This presents little risk in exceeding the lawful limits on state jurisdiction provided for in the law of the sea. Even if the ship, cargo and crew are generally treated as a unit, there is no impediment to other states or Canada adopting a different practice providing there is some basis to assume jurisdiction, which could arguably be the mere statelessness of the vessel and the unlawful nature of the cargo.[229] Although this may be contrary to some experts' views regarding the "ship as a unit," it is in fact a less aggressive approach wherein any authority exercised in respect of the crew would be incidental to, and necessarily in furtherance of, the seizure and disposal of the drugs.

This would seem to present a low legal risk, albeit with two caveats. By destroying the cargo, a nation that may wish to prosecute, such as that of the master, or of the owner of the vessel, or the port of origin, loses that opportunity. This could cause international tension but any demonstrable link to Canada would support CAF action. Arguably, a lack of willingness or ability of that other state to take action would support Canadian action under the protective or objective territoriality principles.[230] Second, even if the focus is not on the crew, they are not stateless and their nation could protest their detention and any interference with their privacy. Such a protest may not be without legal merit. As stated above, if a crew member were hurt or killed, there is the potential for legal action in Canada or in their state. The extent to which Canada would be exposed to legal risk in such a proceeding not only depends upon the CAF having a lawful basis in the law of the sea to board the vessel, it also depends upon the boarding

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[228] Note that in this sentence I am *not* using the term "jurisdiction" in the broader way it is understood in human rights law. Even asserting enforcement jurisdiction against the cargo could lead to Canada assuming "jurisdiction" over the persons on board with regard to human rights law obligations.

[229] Certainly any nexus that could be demonstrated to Canada would support this action.

[230] But short of an armed conflict, enforcement jurisdiction and action would be governed by the peace-time principles of international law including human rights law.

being conducted lawfully. The lawfulness of how the boarding is conducted, especially regarding any use of force against the crew, cannot be assessed without considering Canada's human rights obligations.[231]

International Human Rights Law and the Use of Force

Canada is a party to the *International Covenant on Civil and Political Rights* (the "*Covenant*") and is also bound by customary IHRL.[232] Although the *Covenant* has not been

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[231] Efthymios Papastavridis, "Enforcement Jurisdiction in the Mediterranean Sea: Illicit Activities and the Rule of Law on the High Seas," 581.

[232] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171. I am using the term "customary international human rights law" but it is possible that non-conventional human rights obligations (those not based in a treaty) arise not from customary international law, but from their "recognition as an emanation of a general principle of law." Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 178, 186-187. For a discussion of the origins of non-conventional human rights obligations see Bruno Simma and Philip Aliston, "The Source of Human Rights Law: Custom, Jus Cogens and General Principles," *Australian Yearbook of International Law* 12 (1988-1989): 82. Nevertheless it is beyond dispute that states are bound by customary human rights obligations, or in the wording of the ICJ in the *Corfu Channel Case*, ". . . certain general and well-recognized principles, namely; elementary considerations of humanity, even more exacting in peace than in war . . . ." *Corfu Channel Case*, [1949] I.C.J. Rep. 4 at 22. . In the *Nicaragua Case* (Merits), [1986] I.C.J. Rep. 14 the ICJ said ". . . they [the *Geneva Conventions* of 1949] are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity.'" See para 218. The Court seems to indicating that the rules in the *Geneva Conventions* (although not the *Conventions* themselves) apply in peacetime. See also the *Barcelona Traction Case*, [1970] I.C.J. Rep. 3. At para 34 of this Case, the ICJ discusses *ergo omnes* obligations (rights that all states have an interest in protecting) and says that they derive in part from "principles and rules concerning the basic rights of the human person." In *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran*, [1980] I.C.J. Rep. 3 at para 91 the ICJ asserts: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the *Charter of the United Nations*, as well as with the fundamental principles enunciated in the *Universal Declaration of Human Rights*." The specific rights secured by customary human rights law is beyond the scope of this paper. However, there is no doubt that that the right to life is included. See, Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and the Law Enforcement Paradigms* (Geneva: ICRC, 2013), note 14. In respect of force, the principles in the *UN Code of Conduct for Law Enforcement Officials* (1979) and *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990) provide a baseline. These documents require that the use of force is in accordance with a legal basis, is necessary, and proportional. *UN Code of Conduct for Law Enforcement Officials* G.A. res. 34/169, annex, 34 UN GAOR Supp. (No. 46) UN Doc. A/34/46 (1979). *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 (1990).

directly incorporated into Canadian statutes, most of its obligations are implemented through the rights secured in the *Charter*.[233]

Yet, the application of the *Covenant* during a boarding on the high seas is not entirely settled. Human rights treaties have traditionally been understood to be territorial based, that is within territory of the state party.[234] The extraterritorial application of states' human rights treaty obligations is currently an issue of "lively debate."[235] There are at least two entire works on this topic and a thorough discussion cannot be accomplished here.[236] However, it is possible to identify current trends and briefly examine this issue in the context of stateless vessels.

The disagreement surrounding extraterritorial application is rooted in Article 2 of the *Covenant*, and largely in the second "and": "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory *and* [emphasis added] subject to its jurisdiction the rights recognized in the present Covenant . . . ." This Article and the meaning of the word "and" have been given three different meanings. The first is the literal conjunctive reading; states have obligations only in respect of persons who are both within their territory and who are also subject to their jurisdiction. The second interpretation is disjunctive; states are obligated in respect of persons within their territory, and also in respect of persons who are just within their jurisdiction.[237] A third interpretation has emerged, that the territorial clause only

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[233] LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012), 37.

[234] Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Leiden: Martinus Nijhoff Publishers, 2013), 7.

[235] *Ibid*., 9.

[236] *Ibid*., Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford: Oxford University Press, 2011).

[237] UN Human Rights Committee, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13. (26 May 2004).

modifies the obligation to "ensure" rights.[238] That is, these positive obligations arise only within a state's territory. However, the obligation to *respect* rights applies without territorial limitation to anyone within a state's jurisdiction.[239]

The UN Human Rights Committee and the ICJ have grappled with this issue and both the Committee and the Court tend to support the second or possibly third disjunctive views.[240] In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion, the ICJ concluded ". . . that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in exercise of its jurisdiction outside its own territory."[241] In the *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda),* the ICJ referred to its conclusion reached in the *Wall Case* and ". . . concluded that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,' particularly in occupied territory."[242]

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[238] That is, to take positive steps to give effect to rights and prevent and give redress regarding violations by third parties.

[239] Beth Van Schaack, "The United States' Position on the Extraterritorial Application of the Human Rights Obligations: Now is the time for Change," *International Law Studies* 90, no. 20 (2014). This third approach is supported by Marko Milanovic, *Extraterritorial Application of Human Rights Treaties,* 210-211. For this proposition Beth Van Schaack cites: Rolf Künnemann, "Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights," in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds., 2004), 201, 228–29.

[240] Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, 90. See UN Human Rights Committee, *General Comment No. 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant.*

[241] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, [2004] I.C.J. Rep. 136 at para 111.

[242] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda),* [2005] I.C.J. 168 at para 216. Also of interest is the Canadian Federal Court of Appeal judgment in *Slahi v. Canada (Justice),* 2009 FCA 259 (CanLII), last accessed 16 April 2014, http://canlii.ca/t/25nn8. The narrow issue addressed by the Court of Appeal was whether section 7 *Charter* rights applied to non-Canadian appellants held in the Guantanamo Bay facility because these persons were interviewed by Canadian officials. Their counsel argued that the appellants were subject to the jurisdiction of Canada within the meaning of the *Covenant* because they were interviewed by Canadian officials. Their counsel submitted that since *Charter* rights are informed by international human rights law, the appellants were also within the jurisdiction of Canada for purposes of the *Charter*. This was unsuccessful. However, the Court did not simply assert that the appellants were not also within the *territory* of Canada and hence, the *Covenant* did not apply. Rather, the Court ruled that the members were within the jurisdiction of the U.S., not

As if the interpretation of this Article is not complicated enough, there are compelling arguments that the word "jurisdiction" does not have the same meaning in this context as in the discussion about prescriptive and enforcement jurisdiction. The use of this term in public international law, as previously discussed, refers to the sovereign authority or legal rights of states to make and enforce rules. In IHRL, this term is generally understood to mean the factual exercise of power or authority, regardless of the lawfulness of this exercise.[243] This is supported by the ICJ in addressing responsibility for activities of South Africa in Namibia, "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[244] In the case of *Medvedyev*, the European Court of Human Rights held France had human rights obligations regarding the crew of the vessel *Winner* because ". . . France exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception . . . until they were tried in France."[245] Put another way, "*de facto* control gives rise to *de jure* responsibilities."[246]

There is also authority for the proposition that jurisdiction can arise not only from the exercise of physical control over territory but also solely from an exercise of control over the

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Canada. The Court noted that the international law opinions submitted by counsel regarding "jurisdiction" were in very different contexts, such as the ICJ *Wall Case*, and this led to jurisdiction being defined very broadly.

[243] Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties*, 13. Ralph Wilde, "Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties," *Israel Law Review* 20 (2007): 508, 513-514. In international human rights law, "jurisdiction" is a synonym for power, authority or control over people or territory. Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, 39.

[244] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, [1971] I.C.J. Rep. 16 at para 118.

[245] *Medvedyev and Others v France* (2010), 23. It is noteworthy that in this Case, the *Winner* was Cambodian flagged and therefore France did not have prescriptive jurisdiction over the vessel. Canada is not a Party to the *European Convention on Human Rights* and cases from the European Court are only of persuasive value.

[246] Efthymios Papastavridis, *The Interception of Vessels on the High Seas*, 74 summarizing *Decision as to the Admissibility of Application no. 61498/08 by Al-Saadoon and Mufdhi against the United Kingdom*, (30 June 2009) at para 88, last accessed 13 March 2014, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-93398. "The Court considers that, given the total and exclusive de facto, and subsequently also de jure, control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction." There is much discussion about the nature and degree of control that needs to be exercised and this is a topic that is beyond this discussion.

person. In *Medvedyev*, it was not clear which principle the Court was relying on.[247] However, two years after *Medvedyev*, the Court was addressing a case of African migrants intercepted on the high seas by the Italian authorities. The Court repeated its previous assertions that extraterritorial application of the *Convention* is exceptional and is determined with reference to the particular facts. The Court then stated:

> 74. *Whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction*,[emphasis added] the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Court has now accepted that Convention rights can be "divided and tailored" (see *Al-Skeini and Others*, cited above, § 136-37; compare *Banković and Others*, cited above, § 75).[248]

The Court seems to have settled that jurisdiction can be based on control over the person and also that it would accept the possibility of the third interpretation of Article 2 of the *Covenant*; that states have the obligation to ensure all rights in their territory, and the obligation to respect rights extraterritorially that are relevant to the situation.[249]

Beth Van Schaak, writing in the journal of the U.S. Naval War College, reviewed the jurisprudence of the ICJ and the European Court of Human Rights, and found two broad trends. The first trend is the ". . . gradual convergence of the law emerging from the various human

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[247] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties*, 164.

[248] *Case of Hirsi Jamaa and Other v Italy*, no. 27765/09, (23 February 2012) at para 74, last accessed 5 April 2014, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231. This approach that the *Convention* can be divided and tailored into rights which apply and rights which do not apply was not previously not supported by the European Court of Human Rights. This was until the *Case of Al Skeini and Others v The United Kingdom*, no. 55721/07, (7 July 2011) at para137, last accessed 4 April 2014, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606. This is also arguably supported by the ICJ in *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] I.C.J. Rep.168 at para 219, last accessed 4 April 2014, http://www.icj-cij.org/docket/files/116/10455.pdf. The ICJ identified the violations committed by the occupying power against the right to life and the right to be free from torture, Article 6(1) and Article 7. The court did not address, for example, equality rights or the right to marry.

[249] Of course the Court was not discussing the *International Covenant* but the *European Convention*. See also the concurring judgment of Judge Bonello in *Al-Skeini and Others v the United Kingdom*, wherein he argues passionately and compellingly that each state has broad exterritorial obligations ". . . to ensure the observance of all those human rights *which it is in a position to ensure* [emphasis in the original]."

rights courts and expert bodies that have been confronted with the question of when states' human rights obligations apply abroad." In her view:

> According to this jurisprudence, these obligations apply whenever a State's agents or instrumentalities exercise control, authority, or power over the individuals whose rights are in jeopardy, such as by virtue of States' control of territory, their custody of the individuals in question, their practical ability to respect and ensure rights, or their essential role in a causal chain leading to the violations.[250]

The second broad trend she identifies is that the U.S. is increasingly isolated in its "categorical position" that human rights obligations have no extraterritorial application. But, the U.S. is not alone. Despite the findings of international courts, and the opinion of the UN Human Rights Committee, not all states accept the extraterritorial application of human rights law.[251] At present, in addition to the U.S., these countries would seem to include the Israel, the U.K. and Canada.[252] Furthermore, the U.S. has recently softened its views on extraterritorial application so that it may not be fair to characterize its position as a "categorical" opposition. [253] In its most recent report to the UN Human Rights Committee the U.S stated:

> The United States is mindful that in General Comment 31 (2004) the Committee presented the view that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone

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[250] Beth Van Schaack, "The United States' Position on the Extraterritorial Application of the Human Rights Obligations: Now is the time for Change," *International Law Studies* 90, no. 20, (2014): 61.

[251] Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and the Law Enforcement Paradigms*, 5.

[252] Beth Van Schaack, "The United States' Position on the Extraterritorial Application of the Human Rights Obligations: Now is the time for Change," note 9. For the position of Israel see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, I.C.J. 136 at para 102. The U.K. continues to argue against extraterritorial application under the *European Convention* despite repeatedly losing on this point. See Marko Milanovic, "Hassan v. United Kingdom, IHL and IHRL, and Other News in (Extra)-Territoriality and Shared Responsibility," *EJIL: Talk!* Blog 18 December 2013, last accessed 5 May 2014, http://www.ejiltalk.org/hassan-v-united-kingdom-ihl-and-ihrl-and-other-news-in-extra-territoriality-and-shared-responsibility/#more-10114 and the cases of Al-Jedda and Al-Skeini.

[253] Marko Milanovic, "US Fourth ICCPR Report, IHRL and IHL" *EJIL: Talk!*" (blog) 19 January 2012, last accessed 15 April 2014, http://www.ejiltalk.org/us-fourth-iccpr-report-ihrl-and-ihl/. . Milanovic comments on this shift in the U.S. view.

> within the power or effective control of that State Party, even if not situated within the territory of the State Party." The United States is also aware of the jurisprudence of the International Court of Justice ("ICJ"), which has found the ICCPR "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," as well as positions taken by other States Parties.[254]

The wording of this text is significant because the U.S. does not dispute the position of the Committee or the ICJ jurisprudence as it had previously done; it simply is "mindful" and "aware" of these perspectives.[255] The other significant development is that the U.S. acknowledges in the next two paragraphs of its Report that the *Covenant* does apply during an international armed conflict and refers to IHL and IHRL as "complementary." The U.S. now states that the relationship between the two bodies of law is fact specific rather than simply asserting that IHL will displace IHRL during armed conflict.[256]

Unlike the U.S., in its reporting to the UN Human Rights Committee, Canada does not seem to have addressed its position on the extraterritorial application of human rights treaties.[257] However, the International Committee of the Red Cross (the ICRC) in assessing Canada's position on this issue states that Canada accepts the *Covenant's* application, ". . . but only on the basis of the criterion of 'control over territory,' which Canadian case law seems to equate with

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[254] UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Fourth periodic report United States of America*, UN Doc. CCPR/C/USA/4, 30 December 2011, at para 505, last accessed 3 April 2014, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2f4&Lang=en.

[255] The Report also opens by quoting Hilary Clinton in paragraph 2, "Human rights are universal, but their experience is local."

[256] This is noteworthy, not because the boarding of stateless vessels engages the law of armed conflict, but because presumably, the hypothetical international armed conflict to which the U.S. refers, is at least occurring partially beyond its borders, i.e. extraterritorially.

[257] UN Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fifth Periodic Report Canada*, CCPR/C/CAN/2004/5, 18 November 2004. UN Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Sixth Periodic Reports of States parties due October 2010, Canada*, CCPR/C/CAN/6, 28 October 2013.

situations of occupation."[258] The ICRC assesses that the Canadian Government and the Canadian Courts expressly reject extraterritorial application on the basis of state agent authority or control over the person.[259]

Despite this assertion from the ICRC, the Government's position is not entirely clear. One article that examines the jurisprudence of several national courts and international tribunals in respect of extraterritorial human rights suggests that Canada may have subtly accepted extraterritorial application of human rights obligations. The article notes that in Canada's factum in the *Amnesty* case,

> . . . the government appears to have conceded that international human rights obligations do apply in Afghanistan as the *lex generalis*: 'Canada's operations in Afghanistan . . . are governed by international law, most importantly the *lex specialis* of IHL applicable in times of armed conflict, whereas international human rights law is *lex generalis*.' Because these two bodies of law apply, the government explained, it was neither necessary nor appropriate for the court to apply the *Charter*.[260]

Moreover, in at least three rulings, the Supreme Court states that the principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law, do not extend to participation in processes that violate Canada's international obligations or fundamental human rights norms.[261] Additionally, when discussing

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[258] Gloria Gaggioli, *The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and the Law Enforcement Paradigms*, note 21.

[259] *Ibid*., note 21.

[260] Oona A. Hathaway, Philip Levitz, Elizabeth Nielsen, Aileen Nowlan, William Perdue, Chelsea Purvis, Sara Solow, and Julia Spiegel, "Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?" *Arizona State Law Journal* 43 (2010): 9. However, it is not clear whether the article or the Government's factum were referring to customary human rights law or conventional human rights law.

[261] *R. v. Hape*, 2007 SCC 26 (CanLII) at para 101, last accessed 27 April 2014, http://canlii.ca/t/1rq5n. *Canada (Justice) v. Khadr*, 2008 SCC 28 (CanLII) at para 2, last accessed 25 April 2014, http://canlii.ca/t/1wzlm. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII) at para 14, last accessed 25 April 2014, http://canlii.ca/t/27qn6 . See also *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336 (CanLII) at paras 316-325, last accessed 25 April 2014, http://canlii.ca/t/1w2fh. But it is not clear if the Courts were referring to conventional or customary obligations.

the use of force in the absence of an armed conflict, CAF doctrine provides that "IHRL applies at all times."[262]

What then are the implications for boarding a stateless vessel? The degree of control exercised over the vessel and persons on board suggest that the *Covenant* would apply.[263] Guilfoyle concludes that ". . . an armed boarding party, even one with its law enforcement powers circumscribed . . . exercises a very high degree of effective control over an interdicted vessel. The boarding party will thus be bound by the ICCPR (the *Covenant*) and other treaties to which their State is a party."[264] Even if a state and its courts hold fast to a conjunctive reading of "all individuals within its territory *and* subject to its jurisdiction," customary human rights obligations would still apply.[265]

Assuming the *Covenant* applies, those on board will have the right to life and the right not to be arbitrarily deprived thereof, the right to liberty and security of the person including the prohibition on arbitrary detention, and the right to be free from arbitrary or unlawful interference with privacy.[266] The meaning of "arbitrary" is not defined in the *Covenant*. Nils Melzer reviewed

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[262] Government of Canada, *Use of Force for CF Operations*, B-GJ-005-501/FP-001 (August 2008), paragraph 104(11).

[263] Aside from the de facto or physical control, if a state asserts prescriptive jurisdiction over a person and then exercises it through enforcement jurisdiction, the state arguably has reciprocal obligations regarding that person.

[264] Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 268.

[265] Customary international human rights obligations are not restricted by territory. See Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, 232-235. This is also the view of the United States, or at least the U.S. Army. "IHRL established by treaty generally only binds the State in relation to persons within its territory and subject to its jurisdiction, and tends to be more aspirational. IHRL based on CIL [customary international law] binds all States, in all circumstances, and is thus obligatory." Andrew Gillman and William Johnson eds. *Operational Law Handbook 2012* (Charlottesville VA: The Judge Advocate General's Legal Center and School, 2013), 45, last accessed 14 April 2014, http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf. Customary rights would likely include at least rights regarding right to life and security of persons. It should be noted that if the degree and nature of jurisdiction exercised over the stateless vessel are such that the vessel is assimilated to that State, then the vessel may be "territory" of that State. Additionally, the State of nationality of an injured or killed crewmember could take the view the *Covenant* applied.

[266] *International Covenant on Civil and Political Rights*, Articles, 6(1), 9(1), and 17(1).

the jurisprudence from international courts and the practice of human rights bodies in respect of the right to life and determined that to avoid arbitrariness there is a requirement for: necessity, proportionality, precaution, and a sufficient legal basis in domestic and international law.[267] If the CAF applies its doctrine regarding the use of force outside of an armed conflict, the first two requirements should be met.[268] If operations are planned and conducted to minimize the possibility that force may be used, the need of precaution will be met. The more difficult question arises with regard to the sufficient legal basis. Melzer writes:

> A deprivation of life is 'arbitrary' when lethal force is used *without a legal basis,* [emphasis added] or based on a law which does not strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the State . . . Failure of domestic law to regulate the use of lethal force in accordance with the internationally binding standards may itself amount to a violation of the right to life.[269]

Just as every CAF operation needs a basis in international and domestic law, Melzer's statement about a need for a legal basis includes both international and domestic law.

The consequences of an insufficient legal basis are stark. Consider a situation wherein the boarding operation went beyond what was lawful. That is, the operation went beyond what was permitted by international law or what was duly authorized in Canadian law.[270] From this perspective, any force used by *the crew against the boarding party* could be viewed as self-defence in response to their unlawful detention or arrest, or the unlawful seizure of their cargo or their vessel. In the case of a stateless vessel, such a use of force by the crew would likely be

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[267] Nils Melzer, *Targeted Killing*, 91-102, 118-120.
[268] Government of Canada, *Use of Force for CF Operations*, B-GJ-005-501/FP-001 (August 2008).
[269] Nils Melzer, *Targeted Killing*, 100-101.
[270] To be unlawful under international law, the action would almost certainly have to involve an excessive use of force, or be more than a visit and search of the vessel to verify its nationality, which has an unequivocal basis in article 110 of *UNLCOS*.

governed by the law of their nationality and possibly by the law of the nation of the owners.[271] It is well beyond this paper to assess how several different states would address this issue but Canadian law permits the use of reasonable force to defend oneself and one's property. This is even the case when the interference defended against is *lawful*, but is reasonably believed to be unlawful.[272]

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[271] As O'Connell argues, "a 'ship without nationality,' is not necessarily a ship without law." D.P. O'Connell, 755. This is, unless the vessel is assimilated to Canada such that Canada has exclusive jurisdiction. As discussed above, this would require a genuine link between Canada and the vessel and the vessel must meet the requirements for registration in Canada. See H. Meyers at 318. Only states have international human rights law obligations which is why they do not oblige the civilian crew.

[272] It is interesting to note that subsections (3) of sections 34 and 35 of the Canadian *Criminal Code* provides that someone would be justified in using force to protect themselves or their property from someone acting *with the authority of law* if the person protecting themselves or their property *believes* on reasonable grounds that this other person is acting unlawfully. Section 34 of the *Criminal Code* R.S.C.1985, c. C-46 pertains to defence of the person and provides:

> 34**.** (1) A person is not guilty of an offence if
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
> (c) the act committed is reasonable in the circumstances.
> (2) FACTORS In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
> (a) the nature of the force or threat;
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
> (c) the person's role in the incident;
> (d) whether any party to the incident used or threatened to use a weapon;
> (e) the size, age, gender and physical capabilities of the parties to the incident;
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
> (f.1) any history of interaction or communication between the parties to the incident;
> (g) the nature and proportionality of the person's response to the use or threat of force; and
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.
> (3) NO DEFENCE Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

Section 35 of the *Criminal Code* addresses defence of property:

> (1) A person is not guilty of an offence if
> (a) they either believe on reasonable grounds that they are in peaceable possession of property or are acting under the authority of, or lawfully assisting, a person whom they believe on reasonable grounds is in peaceable possession of property;

A further right to life issue that deserves mentioning is the threat posed to the master and crews of these vessels by the organizations that are expecting delivery of the drugs that the CAF destroys. If these drugs are financing dangerous terrorist groups, as is often claimed, it is possible that the crews would be better off if they had been prosecuted in accordance with the law rather than arriving at their destination with only a story to explain the absence of millions of dollars of narcotics. Even if this concern is beyond the reach of binding human rights obligations, it is sincerely hoped that these second and third order effects are being considered by the CAF and other OEF forces. Effectively "sentencing" the crews of these vessels to death or torture at the hands of criminal organizations is hardly deserved.

In addition to IHRL, the law of the sea also contains, or has incorporated, norms on the use of force. *UNLCLOS* does not address the use of force but provides at Article 293 that a court or tribunal which has jurisdiction over a dispute shall apply ". . . other rules of international law not incompatible with this Convention."[273] In the *M/V Saiga Case*, the International Tribunal for the Law of Sea referred to this Article and ruled that international law requires that: the use of

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(b) they believe on reasonable grounds that another person
    (i) is about to enter, is entering or has entered the property without being entitled by law to do so,
    (ii) is about to take the property, is doing so or has just done so, or
    (iii) is about to damage or destroy the property, or make it inoperative, or is doing so;
(c) the act that constitutes the offence is committed for the purpose of
    (i) preventing the other person from entering the property, or removing that person from the property, or
    (ii) preventing the other person from taking, damaging or destroying the property or from making it inoperative, or retaking the property from that person; and
(d) the act committed is reasonable in the circumstances.
(2) NO DEFENCE - Subsection (1) does not apply if the person who believes on reasonable grounds that they are, or who is believed on reasonable grounds to be, in peaceable possession of the property does not have a claim of right to it and the other person is entitled to its possession by law.
(3) NO DEFENCE - Subsection (1) does not apply if the other person is doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[273] *UNLCOS*, Article 293.

force be avoided as much as possible; any force used must be reasonable and necessary in all the circumstances; and it must take into account the considerations of humanity. These rules regarding the use of force apply both to the use of force against, and on, the boarded vessel.[274] It is noteworthy that although these principles are nearly identical to those found in human rights law, the Tribunal did not refer to human rights law but rather states: "These principles have been followed over the years in law enforcement operations at sea."[275]

In summary, the use of force by the CAF is governed by the law of the sea, IHRL and Canadian law.[276] Although a violation of an IHRL norm is not usually, *per se*, an offence, a violation will usually be a crime under domestic law, such as assault or murder.[277] If a crew member were hurt or killed, their state may potentially have criminal jurisdiction under the passive personality principle. It is also possible that the state of the owner of the vessel could argue for jurisdiction. [278] CAF members are of course liable to be tried under the military justice system, and also by the Canadian criminal justice system for any offence committed on a stateless vessel on the high seas.[279] Additionally, there is a complaint mechanism under a Protocol to the *Covenant* that allows an individual to lodge a complaint against a state. Although there is no "enforcement" mechanism, the state is obliged to reply.[280] If a CAF member was hurt

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[274] *M/V Saiga*, para 158-159. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 80.

[275] *M/V Saiga*, para 156. It is also possible that the Tribunal was referring to international law governing the use of force between states. Guilfoyle notes that an interdiction not permitted by international law would be prohibited under the *UN Charter* as involving the threat of the use of force. However, this speaks to *jus ad bellum* not *jus in bello* rules. Also see Heintschel von Heinegg, "Maritime Interception/Interdiction Operations," at 392.

[276] CAF members are not only subject to discipline before a military tribunal but by virtue of the s. 477.1(e) of the *Criminal Code* they are also subject to Canadian civil jurisdiction while outside the territory of any state.

[277] Some gross violations of human rights have themselves been criminalized such as torture or genocide.

[278] I am not addressing claims for property damage and economic loss. It is well accepted that the law of sea provides that wrongfully interdicted vessels must be compensated for reasonably foreseeable losses. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 328-330. *UNCLOS*, Article 110(3).

[279] s. 477.1(e) *Criminal Code*.

[280] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, Canada Treaty Series 1976/47.

or killed by the crew, despite the purported assertion of Canadian jurisdiction against, or on, the vessel, Canadian criminal law has generally not extended prescriptive or enforcement jurisdiction to non-Canadians on the high seas on non-Canadian vessels. This means that the alleged perpetrators would be beyond the reach of Canadian law.

CHAPTER III - CANADIAN DOMESTIC LAW

As discussed above, any enforcement action against stateless vessels, or the persons on board, requires that the boarding state has a basis to assert prescriptive and enforcement jurisdiction, in both domestic and international of law.[281] For Operation Artemis, the purported prescriptive and enforcement jurisdiction in domestic Canadian law is presumably executive authority, that is, the Crown prerogative. However, the law enforcement nexus raises questions as to whether a statutory basis is required, as with other law enforcement activities. Given that the CAF have no standing mandate to enforce the law and CAF members are not police officers, this Operation also raises questions about the mandate and authority of the CAF.[282] Additionally, this Operation raises the issue of the potential application of the *Charter*.[283]

Crown Prerogative

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[281] See note 41 above.

[282] CAF members, other than military police, only have peace officer status when employed on duties that necessitate them having peace officer powers. For the specific conditions attached to this status see the definition of "peace officer" at section 2(g)(ii) of the *Criminal Code*, and Article 22.01 of *Queen's Regulations and Orders for the Canadian Forces*, last accessed 5 May 2014, http://www.admfincs.forces.gc.ca/qro-orf/vol-01/doc/chapter-chapitre-022.pdf. See also Department of National Defence, B-GJ-005-300/FP-001, *CF Operations Manual* (Ottawa: DND Canada, 2010), 7-8. Department of National Defence, B-GJ-005-501/FP-001, *Use of Force for CF Operations* (Ottawa: DND Canada, 2008), 3-1–3-2. Recall that the Government of Canada's Counter- Terrorism Strategy states that all counter-terrorism activities must adhere to the rule of law and government institutions must act within legal mandates. *Building Resilience Against Terrorism*, 11.

[283] To fully address the legal issues around this type of operation a *Charter* analysis is necessary but this is too ambitious for this paper. However, there are compelling arguments that the *Charter* does apply in respect of enforcement action on board a stateless vessel on the high seas and this should be examined further. As one author explained, "The majority's concern [in *Hape*], about *Charter* enforcement infringing sovereignty in another state do not arise when Canada interdicts a stateless vessel on the high seas, because there is no sovereignty to infringe and such interdictions are not prohibited at international law." See Drew Tyler, "Does the Charter Float? The Application of the *Canadian Charter of Rights and Freedoms* to Canada's Policing of High Seas Fisheries," *Canadian Yearbook on International Law* (2010): 204. The same would appear to hold true for the later cases of *Amnesty* and *Khadr*. In *Khadr*, the Supreme Court found that the conditions Khadr was held in were illegal under U.S. and international law, "Hence, no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international [human rights] obligations." *Khadr* was not a situation of a vacuum of law, like is probably the case on a stateless vessel, but the situation seems analogous. See *Canada (Justice) v. Khadr*, 2008 SCC 28 (CanLII) at para 26, last accessed 17 April 2014, http://canlii.ca/t/1wzlm.

The Federal Court has confirmed that the Crown's sources of authority are statutes and the prerogative.[284] In the nineteenth century, the Supreme Court of Canada stated that the prerogatives of the Crown are " . . . great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people . . . they form part of and are generally speaking 'as ancient as the law itself.'"[285] In 2010 the Supreme Court of Canada stated:

> The prerogative power is the 'residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown': *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, 1933 CanLII 40 (SCC), [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.[286]

These prerogative powers are not fixed:

> Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: *Attorney General v. De Keyser's Royal Hotel*, supra. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of 'shrinking the prerogative powers of the Crown down to a very narrow compass' (supra). Professor Wade agrees:
>
> [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into

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[284] *Schreiber v. Canada (Attorney General)*, 1999 CanLII 9372 (FC), last accessed 27 April 2014, http://canlii.ca/t/46pn.

[285] *R. v. McLeod* (1883), 8 S.C.R. 1 at 26.

[286] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para 34, last accessed 17 April 2014, http://canlii.ca/t/27qn6. There is not a consensus as to how the prerogative is best described, whether as a "residue of discretionary or arbitrary authority" or something like a "non-statutory administrative power accorded by the common law to the Crown." Discussing these differing opinions is not the purpose of this paper.

> abeyance. E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41.) [287]

Therefore, there is no doubt that a statute can limit or displace the prerogative when it does so expressly.[288] However, there is some uncertainty as to whether this can occur through necessary implication.

For the prerogative to be displaced by necessary implication, the statute in question must bind the Crown. The *Interpretation Act* provides that, "No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment."[289] The wording in the statute does not have to be explicit. A statute will also bind the Crown if there is a clear intention to do so, or if the statute would be wholly frustrated if the Crown were not bound, that is, there would be an absurd result.[290]

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[287] *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (Ont CA) at para 27, this quotation cited with approval *in Khadr v. Canada (Attorney General)*, 2006 FC 727 at para 88, last accessed 5 May 2014, http://canlii.ca/t/1nlbw. See also U.K. House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (2004) Memorandum from the Treasury Solicitor's Department (Evidence presented to the Committee, Attachment D), last accessed 10 April 2014, http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf. This opinion states, "where the Crown is empowered by statute to do something that it could previously do under the prerogative, it can no longer act under the prerogative but must act within the statutory scheme." See also Paul Lordon, *Crown Law*, 67. "Where the prerogative is supplanted by statute, the Crown may no longer act pursuant to the prerogative but must act under and subject to the conditions imposed by statute."

[288] "The prerogative power is, of course, subject to the doctrine of parliamentary supremacy and Parliament, by statute, may withdraw or regulate the exercise of the prerogative power." *Vancouver Island Peace Society v. Canada*, [1994] 1 FC 102, last accessed 5 May 2014, http://canlii.ca/t/4gqk.

[289] This is rule in found at section 17 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

[290] The Supreme Court of Canada explained that the wording "mentioned or referred to" are capable of encompassing:

> (1) expressly binding words ("Her Majesty is bound"); (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette*, *supra*; and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

See *Friends of the Oldman River Society v. Canada (Minister of Transport)* 1992 CanLII 110 (SCC), last accessed 8 April 2014, http://canlii.ca/t/1bqn8. This test was recently employed by the Federal Court of

The Federal Court in 2006 did not give a definitive answer whether the prerogative could be displaced by necessary implication but it did state:

> Assuming that prerogative powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:
>
> Where Parliament provides by statute for powers previously within the prerogative being exercised subject to conditions and limitations contained in the statute, [emphasis added by the Court] there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. 'Otherwise,' says Swinfen-Eady M.R., 'what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?' [291]

Despite the Federal Court's uncertainty, in 2007, the B.C. Court of Appeal ruled that ". . . express statutory language is not required to displace a prerogative power: if the statute confers the power to do the same thing, the prerogative is displaced by necessary implication."[292]

The ancient prerogative for "defence of the realm," which can be traced back to the feudal responsibilities of English kings during the Middle Ages, is one of the prerogatives that statute law has not displaced. The *Constitution Act* of 1867 allocated authority over all matters in

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Appeal in *Manitoba v. Canadian Copyright Licensing Agency (Access Copyright)*, 2013 FCA 91 (CanLII), last accessed 18 April 2014, http://canlii.ca/t/fwvf5. Neither the *Criminal Code* nor the *Controlled Drugs and Substances Act* (*CDSA*) contain a section explicitly binding her Majesty. However, both contain exemptions from their application for law enforcement and the military. In the *Criminal Code*, sections 25 and 25.1 justify, under specific conditions, the commission of acts or omissions by public officers that would otherwise be an offence. Section 5 specifies that nothing in the *Code* effects laws relating to the CAF. Also, section 117.01 permits public officers to possess weapons that would otherwise be unlawful. In the *CDSA*, sections 4(1) and 55 allow the Governor in Council to make Regulations permitting law enforcement to do things that would otherwise be an offence.

[291] *Khadr v. Canada (Attorney General*), 2006 FC 727 (CanLII) at para 89, last accessed 5 May 2014, http://canlii.ca/t/1nlbw, citing Justice Bastarache, dissenting on a different issue in *Ross River Dena Council Band v. Canada*, 2002 SCC 54 (CanLII) at para 4, last accessed 4 May 2014, http://canlii.ca/t/51r1. This test was also employed by the Federal Court in *Turp v. Canada (Justice)*, 2012 FC 893 (CanLII) at para 24, last accessed 5 May 2014, http://canlii.ca/t/fs9wr.

[292] *Delivery Drugs Ltd. v. Ballem*, 2007 BCCA 550 (CanLII) at para 59 (leave to appeal dismissed), last accessed 17 April 2014, http://canlii.ca/t/1tng5. Phillipe Lagassé writes that the *Khadr* jurisprudence suggests that ". . . prerogative powers can serve as a parallel source of authority when the Crown is not actually bound." See Phillipe Lagassé, "Parliamentary and Judicial Ambivalence Towards Executive Prerogative Powers in Canada" *Canadian Public Administration* 55 no. 2, (June 2012): 165-170. He adds at page 167 that, "The ability of statutes to limit prerogatives depends on the degree of precision in the legislation. If a statute is silent about particular aspects of the prerogative or the provisions of the statute are permissive, the Crown's powers are unaffected."

respect of the "militia, military and naval service, and defence" to "the Queen, by and with the Advice and Consent of the Senate and House of Commons."[293] However, matters of war and peace, that is, the defence of the realm and decisions related to the disposition of the armed forces, remain executive prerogatives of the Crown.[294] The *National Defence Act* (the *NDA*) has largely supplanted the Crown's prerogative powers to control and manage the military but "the Crown's prerogative powers over matters of war and peace were left intact."[295] In practical terms, this means that Cabinet and the Prime Minister, not Parliament, have the right to direct and deploy the CAF and decide upon the duration and scope of operations.[296]

Even though the Supreme Court of Canada referred to the prerogative as discretionary or arbitrary, this does not mean the Crown may exercise the prerogative in an unfettered way. The Federal Court in *Smith v Canada (Attorney General),* citing earlier jurisprudence, held that

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[293] *Constitution Act*, 1867, 30 & 31 Victoria, c.3 (U.K.), section 91(7).

[294] Philippe Lagassé, "Accountability for Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight," IRPP Study No. 4 (March 2010): 6. Paul Lordon, *Crown Law*, 76-77, 81-82.

[295] Paul Lordon, *Crown Law*, 82. Philippe Lagassé, "Accountability for Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight," 6. The "war prerogative" as understood in the U.K. is said to extend ". . . at least, to the powers to (1) declare war, (2) deploy the armed forces, (3) determine when to deploy the armed forces, (4) determine the objectives of the deployment, (5) determine the armament of the forces, and (6) conduct the operations of war." Rosara Joseph, *The War Prerogative: History, Reform and Constitutional Design* (Oxford: Oxford University Press, 2013), 116.

[296] Philippe Lagassé, "Accountability for Defence: Ministerial Responsibility, Military Command and Parliamentary Oversight," 7, 41. However, another author suggests that, "The scope of this prerogative and the extent to which is applies when war is merely apprehended is not clear." Paul Lordon Q.C. *Crown Law*, 76. It is true that there are questions as to the boundaries around the prerogative. It is also clear that new prerogative powers cannot be created, "However, because the prerogative is not codified or frozen at a particular point of time, *it can still to some extent adapt to changed circumstances* [emphasis added]." See, U.K. House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (2004) "Memorandum from the Treasury Solicitor's Department," (Evidence presented to the Committee, Attachment D). It is not consistent with modern practice to suggest, as Lordon does, that the boundary of this uncertainty arises regarding military operations short of "war." One need only review the media for the number of CAF missions abroad that do not include participation in an armed conflict. The role that Government currently envisions for the CAF is no longer limited to participation in armed conflict but also includes their use a tool of foreign policy, which is another prerogative power that has not been displaced. Additionally, there is no statutory basis to support the suggestion that the prerogative has been displaced for military operations other than war. If this author's view is correct, the Crown would need to legislate to create authority for these operations however this would certainly displace the prerogative. So, he seems to be creating a "Catch-22" situation for Government. If Lordon's view reflects the state of the law, many missions, dating back to beginning of peace keeping, may have been unlawful.

certain exercises of the prerogative are not subject to judicial review if they are "pure policy or political choices."[297] However, the Federal Court continued to clarify, "But where the subject-matter of a decision directly affects the rights or legitimate expectations of an individual, a court is both competent and qualified to review it."[298] In the *Amnesty* case, the Government argued that the Court could not adjudicate on the claims brought on behalf of Afghan detainees because the case involved "an exercise of the prerogative and matters of high policy that are generally not justiciable."[299] While not ruling on this specific question, the Court held that since there was an allegation of *Charter* violations, the issue was justiciable, that is, it was subject to the review of the Court.[300]

Additionally, all exercise of prerogative powers must be within the jurisdiction of the Crown under the prerogative power. In the case of *Kamel v. Canada (Attorney General)* the Federal Court quoted Lord Denning:

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[297] *Smith v Canada (Attorney General),* 2009 FC 228 CanLII at para 26, last accessed 16 April 2014, http://canlii.ca/t/22pfj. Traditionally "defence of the realm" and the "making of treaties" have been in this category. Citing *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (Ont CA) at para 58. See also *Guergis v. Novak et al*, 2012 ONSC 4579 (CanLII), last accessed 2 May 2014, http://canlii.ca/t/fsg9t.

[298] See also *Drabinsky v. Advisory Council of the Order of Canada*, 2014 FC 21 (CanLII) at para 18, last accessed 12 April 2014, http://canlii.ca/t/g2m6h, citing *Black v Canada (Prime Minister)* at para 51.

[299] *Amnesty International Canada v. Canadian Forces*, 2008 FC 162 (CanLII) at paras 121-125, last accessed 23 April 2014, http://canlii.ca/t/1vmmr. Another ruling in the *Amnesty* litigation addressed the test for whether a group such as the B.C. Civil Liberties Association or Amnesty International could commence litigation on behalf of Afghan detainees. After reviewing several Supreme Court cases, the Federal Court approved these organization as Parties to the litigation, and stated:

> . . . the Supreme Court of Canada has recognized that courts have the discretion to grant standing to litigants who have no personal interest in an issue of constitutional or public law where the litigants in question can establish that:
>
> 1. the action raises a serious legal question;
>
> 2. the party seeking standing has a genuine interest in the resolution of the question; and
>
> 3. there is no other reasonable and effective manner in which the question may be brought to court.

Amnesty International Canada v. Canadian Forces, 2007 FC 1147 (CanLII), last accessed 23 April 2014, http://canlii.ca/t/1tgt2. The same test would likely be used if litigation were brought on behalf of the crew of a stateless vessel.

[300] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336 (CanLII) at paras 87-91, last accessed 23 April 2014, http://canlii.ca/t/1w2fh.

> The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.[301]

So, in the case of an exercise of prerogative powers, the question will be whether the power exercised is truly within Crown's prerogative powers.[302] That is to say, the courts will review the issue of "jurisdiction" to ensure the use of the prerogative is not in an area that is occupied by statute.

Additionally, decisions based on the Crown prerogative can be judicially reviewed where a person's rights or legitimate expectations have been affected. Therefore, as mentioned in the *Amnesty* case, the exercise of the prerogative is subject to review in accordance with the *Charter*.[303] In *Canada v (Prime Minister) v Khadr* a unanimous Court held that:

> It is for the executive and not the Courts to decide whether and how to exercise its powers [i.e. the prerogative] but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v British Columbia (Attorney General*).[304]

Mandate of the Canadian Armed Forces

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[301] *Kamel v. Canada (Attorney General)* 2008 FC 338 (CanLII) at para 54, last accessed 23 April 2014, http://canlii.ca/t/1x4kx, citing *Laker Airway Limited v. Department of Trade*, [1977] Q.B. 643 at page 705.

[302] *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (FC), last accessed 18 April 2014, http://canlii.ca/t/4gqk.

[303] *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (FC). Also see *Kamel v. Canada (Attorney General)* at paras 50-56, citing *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), last accessed 15 April 2014, http://canlii.ca/t/1fv0g.

[304] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII) at para 36, last accessed 17 April 2014, http://canlii.ca/t/27qn6, citing *Operation Dismantle v the Queen*, and *Air Canada v. British Columbia*, 1989 CanLII 95 (SCC), last accessed 4 May 2014, http://canlii.ca/t/1ft6z.

The primary role of the Canadian Armed Forces is the defence of Canada.[305] The two other roles identified by Government are "defending North America" and "contributing to international peace and security."[306] It is noteworthy that the *NDA* does not address the mandate for the CAF or the authority for their deployment. It does not even establish the CAF, it simply recognizes their existence.[307] The mandate of the CAF must then be based in the common law, including lawful executive Government direction, that is, the Crown prerogative, which forms part of the common law.

As for the mandates of other Departments, counter-terrorism activities and all matters related to national security are primarily the responsibility of the Minister of Public Safety. In respect of international cooperation on counter-terrorism and in responding to terrorist incidents abroad, the Minister of Foreign Affairs is the lead. However, Canada's Counter-Terrorism Strategy states, "The Minister of National Defence . . . also plays a critical role in preparation for, and execution of, any deployment of the CAF in response to a terrorist activity at home or abroad."[308] The *Canada First Defence Strategy* provides that the CAF also has a role in the ". . . support of the Government's foreign policy and national security objectives."[309] The CAF is also called upon to ". . . assist other government departments and civilian authorities in addressing security concerns such as over-fishing, organized crime, drug and people smuggling and

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[305] *CF Operations Manual*, 7-1. *Canada First Defence Strategy*, 7.

[306] *Canada First Defence Strategy*, 7 – 8. This document, although not signed, begins with a cover letter from the Prime Minister so it presumably carries the authority of his office. See also the former Government's National Security Strategy, at 49. It states that the Canadian Forces are an "essential national security capability" which "must . . . be able to defend Canada, help secure North America, and address threats to our national security as far away from our borders as possible."

[307] *National Defence Act*, R.S.C. 1985, c. N-5, s. 14

[308] *Building Resilience Against Terrorism*, 26. This is simply stating the obvious, that the Minister of National Defence has responsibility for the CAF, which could be called upon to assist. This is in keeping with section 4 of the *National Defence Act* which provides that the Minister of National Defence has "management and direction" of the CAF.

[309] *Canada First Defence Strategy*, 3.

environmental degradation."[310] Importantly, neither the CAF's role in counter-terrorism nor its duty to stand ready to assist other Departments give it a standing law enforcement mandate.[311]

Can the CAF's mandate be expanded? The short answer is likely yes, but as with many legal issues, the answer is qualified. This expansion can happen through two means. First, because the CAF's mandate is determined by the common-law, it presumably could be expanded by the prerogative.[312] A limited example of this is the *Canadian Forces Armed Assistance Directions* which allows the CAF to assist the RCMP in response to "a disturbance of the peace affecting the national interest."[313] These *Directions* are an Order-in-Council made with the authority of the Crown prerogative. So, in this respect, by making this Order, the Crown has implicitly expanded the mandate of the CAF to undertake law enforcement tasks.[314] There is, however, contrary authority. Paul Lordon asserts that the Crown cannot create legislation through the use of the prerogative. But, he states that there is some recognition in the case law that the Governor in Council could issue regulations, orders or statutory instruments through use of the prerogative in cases ". . . where vested rights are not affected or where matters of national security are involved."[315]

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[310] LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012), 18.

[311] *CF Operations Manual*, 7-8

[312] As briefly mentioned in *Dixon v Canada*, the Governor in Council is of the view that a government department can be "created, directed and disbanded as the Governor in Council sees fit." *Dixon v Canada (Commission of Inquiry into the Deployment of the Canadian Forces to Somalia)*, [1997] 2 FC 391, last accessed 16 April 2014, http://canlii.ca/t/4ftc.

[313] P.C. 1993-624.

[314] In the United Kingdom one of the remaining prerogative powers is "the use of armed forces within the United Kingdom to maintain the peace in support of the police." See House of Commons Public Administration, Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (4 March 2004), last accessed 17 April 2014, http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/422/422.pdf at 6.

[315] Paul Lordon, *Crown Law*, 19-20.

The prerogative is not the only means by which the CAF could take on other than traditional defence tasks. Amendments to the *NDA* in 1998 provide a mechanism for at least an *ad hoc* expansion of the CAF's mandate.[316] These amendments provide that the Governor in Council on its initiative, or the Minister of National Defence upon the request of the Minister of Public Safety and Emergency Preparedness, may issue direction authorizing the CAF to *provide assistance* [emphasis added] in respect of any law enforcement matter.[317] This is not an expansion of the CAF's "standing mandate," as it is sometimes called, since the CAF are *assisting* law enforcement agencies whose primary mandate is law enforcement.[318]

Although this assistance would normally occur within Canada, there is nothing inherently unlawful in this assistance occurring extraterritorially. But, outside of an armed conflict, the CAF is bound by Canadian law that applies in respect of law enforcement. Because the CAF continues to be bound by the law, when the CAF is providing assistance to another Department, it cannot acquire a jurisdiction or authority any larger than that of the Department it is assisting. For example, when assisting in law enforcement, even though the CAF may possess better capabilities than the law enforcement agency to intercept a suspect's private communications, the CAF is bound by the same legal restraints and constraints that apply to the police.[319] Namely,

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[316] Bill C-25, *An Act to Amend the National Defence Act and make Consequential Amendments to other Acts*, S.C. 1998 c.35 s.87.

[317] s. 273.6(1) *NDA*. The existence of this provision suggests that law enforcement is not within the CAF's standing mandate as established by common law. If it was, this provision, granting authority to the Governor-in-Council would be redundant. This is consistent with CAF doctrine that provides that, other than in defence of Canada operations, the CAF plays a supporting role to other authorities. See *CF Operations Manual* at 7-1. CAF doctrine states that "authority to deploy the CAF on operations" comes from two legal bases: the *National Defence Act*; or the Crown prerogative, including the Canadian Forces Armed Assistance Directions". See *Use of Force in CF Operations*, 1-1 – 1-2.

[318] It is noteworthy that the Governor-in-Council theoretically does not require the request or concurrence of Minister of Public Safety and Emergency Preparedness before authorizing the CAF to assist in law enforcement.

[319] But, presumably the CAF would never lose their ability to also act within the Defence mandate, when directed to do so by the Crown. As can be seen with Operation Artemis, when the two mandates seem to become intertwined, the applicable rules are complex.

the requirement for judicial authorization would apply to the CAF just as it applies to the law enforcement agency that the CAF is assisting; *legal limitations do not disappear because the military has been called to assist.*

From the above discussion it should be apparent that first, the Government can deploy the CAF to conduct operations related to the defence of Canada. Second, the Government, by use of the prerogative or statute, could permit the conduct of operations not normally seen as part of the defence mandate, such as law enforcement or tasks akin to law enforcement and thus, in effect, expand the mandate of the CAF. But, in both these two cases, CAF activities and operations are governed by the law. Where the prerogative is used to authorize the CAF to conduct any task, especially those beyond the accepted defence mandate, this use will be subject to the limits on the exercise of the prerogative. For example, a direction from Government that the CAF establish a national television broadcast service, as unlikely as this might be, would not exempt the CAF from the regime established by the *Broadcast Act* and the *Radio Communications Act*.[320] That is, unless these *Acts* allow for the Governor in Council to grant such exemptions. Similarly, with law enforcement, any enforcement jurisdiction exercised by the CAF, whether as part of an expanded mandate or within its standing mandate, *extends only so far as the prerogative has not been displaced by statute*.[321] Where the prerogative has been displaced, the statute automatically governs. As stated above, this is an area wherein the Courts could review Government's use of the prerogative to ensure it was not "mistaken."

Crown Prerogative in this Operation

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[320] Both *Acts* explicitly bind the Crown.

[321] This is of course also premised upon a lawful prescriptive jurisdiction to support this enforcement jurisdiction.

Although the prerogative's use in the defence of Canada and to deploy the CAF is well established,[322] the maritime counter-narcotics operation in issue is arguably not merely an operation in "defence of the realm" as this prerogative power is understood. It is indeed not entirely clear whether and to what extent the prerogative applies in respect of matters of national security, or for that matter, law enforcement, as distinct from national defence. As Canada's Counter-Terrorism Strategy reflects, "The dividing lines between security policy and foreign and defence policy have blurred significantly."[323] Nevertheless, despite these complications and despite the statutory authority to deploy the CAF to assist in law enforcement, I will assume for the moment that Operation Artemis was authorized through use of the prerogative.

Lieutenant-Commander (LCdr) McLeod in her paper on securitization of migration and the Royal Canadian Navy examines the boundaries of the application of the prerogative through the example of a hypothetical civilian cargo vessel approaching Canada that intends to launch a terrorist attack.[324] She asserts that this would be a law enforcement task for the RCMP, an approach that is in keeping with Canada's Counter-Terrorism Strategy. She states, however, that if a pending attack is so large that it would "undermine the security of the state," then it is akin to an armed attack and would demand the action of the CAF under the defence of Canada mandate.[325] It could therefore be considered a national security or national defence matter.

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[322] Alexander Bolt, "Crown Prerogative Decisions to Deploy the Canadian Forces Internationally," in *Canada and the Crown: Essays in Constitutional Monarchy*, D. Michael Jackson and Philippe Lagassé, eds., 220-221 (Montreal: McGill-Queens University Press, 2014). LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012), 88.

[323] *Building Resilience Against Terrorism*, 12.

[324] LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012).

[325] *Ibid*., 83-84.

However, such an attack would still be a law enforcement issue, since no matter how large the attack, it is still a crime. About national security and national defence, LCdr McLeod states:

> . . . the situation is not so clear when it comes to responding to a 'national security' crisis that does not immediately engage a defence of Canada mandate . . . there is no specific Canadian case law providing definitive guidance that 'national security' exists as a specific power under the Crown prerogative. [326]

Although there is no jurisprudence that provides definitive guidance, at least one case extends the prerogative to matters of national security.[327] The Federal Court in *Vancouver Island Peace Society v Canada* stated:

> The royal prerogative is comprised of the residue of miscellaneous powers, rights, privileges, immunities and duties accepted under our law as vested in Her Majesty and under our Constitution exercised by the Governor in Council acting on advice of Ministers. Orders in Council may express the decisions of the Governor in Council in relation to matters within the discretionary authority of prerogative powers. Traditionally the courts have recognized that within the ambit of these powers the Governor in Council may act in relation to matters concerning the conduct of international affairs including the making of treaties, and the conduct of measures concerning national defence *and security* [emphasis added].[328]

But this is only so helpful. As discussed at the beginning of this paper, the Operation in question is hard to classify as a mission relating primarily to law enforcement, national security, or defence. Furthermore, since there is no answer as to what the prerogative authorizes regarding national security or whether it has been displaced or put into abeyance by statute in this regard, another approach may be beneficial.

That is, rather than looking at the broad motives behind the Operation such as defence, security or suppression of crime, we can examine specifically what is being done. These tasks

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[326] *Ibid*., 84.

[327] Also, Canada's Counter-Terrorism Strategy states, "Other counter-terrorism responsibilities are determined by Cabinet pursuant to the Crown's prerogative powers with respect to actions taken in the defence of Canada and the conduct of foreign affairs." *Building Resilience Against Terrorism*, 31. Namely, the Government is of the view that some counter-terrorism activities are within the defence mandate.

[328] *Vancouver Island Peace Society v. Canada*, 1993 CanLII 2977 (FC), last accessed 5 May 2014, http://canlii.ca/t/4gqk.

can be examined as to whether they seemingly fall within the prerogative or whether Parliament has provided by statute for the exercise of these powers.[329]

Statutory Authority

As addressed earlier, Canada is conducting operations to disrupt criminal and terrorist financing and to keep drugs off Canadian streets.[330] These tasks occur concurrently with the boarding and search of vessels, and the seizure and destruction of narcotics. In examining the relevant statutory authority, there are three specific areas of interest. First, several provisions of statute law specifically address the type of activities in issue: drug smuggling and terrorist financing.[331] Second, Canada has chosen not to enact legislation that would allow a certain type of extraterritorial counter-narcotics enforcement even though specifically permitted in the *UN Narcotics Convention*. Finally, there is an area where Canada has undertaken similar extraterritorial enforcement action but specifically through statutory amendment.

Most of Canada's obligations under *UNCLOS* are enacted in the *Oceans Act*. This *Act* and section 477.1 of the *Criminal Code* extend Canadian prescriptive jurisdiction over federal offences that are:

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[329] This approach is seemingly consistent with the test to determine whether a use of the prerogative is judicially reviewable. That is, the issue is not the source of the authority but its subject matter. See *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (Ont CA) at para 47.

[330] See the comments from the Minister of Public Safety and Minister of National at pages 7-8.

[331] In reviewing Canadian statutes, one should bear in mind the presumption against extraterritoriality. Although Parliament ". . . has the legislative power to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary." *Society of Composers, Authors, and Music Publishers of Canada v Canadian Association of Internet Providers*, [2004] 2 S.C.R. 427 at 454. The Supreme Court of Canada has employed the "real and substantial connection test" to determine when a transnational offence has taken place in Canada. This is often called the *Libman Test*, after the case in which this approach was developed. *Libman v The Queen*, [1985] 2 S.C.R. 178 at para 74. It should not to be confused with the principles of extraterritorial jurisdiction. However, one author seems to be in favour of such a simplified test for extraterritorial jurisdiction. James Crawford, *Brownlie's Principles of Public International Law*, 486 suggests a simpler approach of whether there is "a real and not colourable connection" between the subject matter and the state.

> (a) [committed in specific circumstances] in the exclusive economic; zone;
> (b) committed in a place by or above the continental shelf [and in specific circumstances];
> (c) committed *outside Canada on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament* [emphasis added]*;*
> (d) committed outside Canada in the course of hot pursuit; or
> (e) *committed outside the territory of any state by a Canadian citizen* [emphasis added].

Paragraph (c) grants jurisdiction on board Canadian vessels wherever they may be, on the high seas or even within another state. Paragraph (e) is an exercise of the nationality principle, wherein prescriptive jurisdiction is provided for Canadians in ungoverned spaces such as the high seas.[332]

Section 477.3 of the *Criminal Code* provides the accompanying enforcement jurisdiction for the offences over which prescriptive jurisdiction is granted in section 477.1. Section 447.3 allows a judge to issue a warrant for arrest, search and seizure regarding vessels outside of Canada in cases provided for in section 477.1. These provisions could be used, for example, to search and seize drugs on board a Canadian vessel on the high seas. This section was used at least once to obtain a warrant authorizing entry, arrest, search and seizure of a foreign vessel on the high seas that was suspected of narcotics trafficking in Canada.[333]

Canada implemented its obligations under the *UN Narcotics Convention* primarily through the *Controlled Drugs and Substances Act* (*CDSA*). The *CDSA* addresses the possession and trafficking of narcotics, and their seizure and destruction. The *CDSA* permits anyone who

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[332] There are more specific provisions that extend prescriptive jurisdiction for particular crimes to the territory of other states. See section 7(4.1) with regard to sexual offences against children.

[333] *R. v. Rumbaut*, 1998 CanLII 9798 (NB Q.B.), last accessed 17 April 2014, http://canlii.ca/t/1kf2z. The Court was able to issue the authorization and enter a conviction because of the doctrine of constructive presence and hot pursuit; the vessel having been pursued since leaving Canada. See 477.1(d) of the *Criminal Code*.

has had a narcotic seized by a peace officer to apply for its return.[334] If an application is not made within 60 days of the seizure, and the substance is not required for a trial under the *CDSA* or any other federal Act, the narcotic may be disposed of in accordance with Regulations or as the Minister of Health directs.[335] The *CDSA* does not include explicit provisions regarding jurisdiction (except for addressing the forfeiture of offence related property that is located outside of Canada). Therefore, it is presumed to be limited to Canada and its only extraterritorial reach is by operation of sections 447.1 and 447.3 of the *Criminal Code*.[336]

It is interesting to note that the *UN Narcotics Convention* addresses circumstances in which states must take jurisdiction and enact legislation, and circumstances wherein the exercise of jurisdiction is permissive.[337] Canada did not implement the permissive jurisdiction.[338] One of the areas *not* implemented is regarding foreign-flagged vessels on the high seas where the flag state has authorized action.[339] Similarly, the *Convention* at Article 7, contemplates states taking some action against stateless vessels trafficking in narcotics, but Canadian legislation does not address this issue either.[340]

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[334] s. 24(1) *Controlled Drugs and Substances Act*.
[335] *Ibid*., s. 25.
[336] Robert Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 405.
[337] See note 136.
[338] OECD Directorate for Financial and Enterprise Affairs, "Follow-up Report on the Implementation of the Phase 2 Recommendations," (21 June 2006): 5, last accessed 15 April 2014, http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/36984779.pdf. ". . . Canada has established extraterritorial jurisdiction over offences including the following: air piracy, the sexual exploitation of children, terrorist acts, offences against internationally protected persons, the protection of nuclear material, torture, war crimes, murder and bigamy. *The Canadian authorities explained . . . that* nationality jurisdiction was not established over the foreign bribery offence because *it has generally been the policy to only take extraterritorial jurisdiction where there has been a treaty obligation to do so* [emphasis added]." See also Robert Currie and Dr Joseph Rikhof, *International & Transnational Criminal Law* 2nd ed., 367.
[339] Article 4(1)(b)(ii) of the *Convention*. See the section above entitled *The UN Narcotics Convention*.
[340] Recall from the above discussion that stateless vessels are not included in Article 4 of the *Convention* that addresses jurisdiction.

Canadian criminal law also contains a number of provisions regarding terrorism.[341] The definition of "terrorist activity" includes all extraterritorial acts and omissions.[342] However, the offences of terrorism, terrorist financing and dealing in terrorist property are territorial, or are restricted to offences that: are aimed at Canadians, aimed at the Canadian government, are committed by Canadians, or that take place on a Canadian registered vessel.[343] Additionally, the *Security Offences Act* extends Canada's extraterritorial prescriptive jurisdiction in respect of offences under any law of Canada ". . . where the alleged offence arises out of conduct constituting a threat to the security of Canada."[344] However, as incredibly broad as this seems, generally, this "threat" must be in the nature of violence, threats of violence, espionage, or covert actions, so this *Act* is not of much assistance in addressing the drug trafficking in issue.

The offences that address terrorist financing, if extended to persons on stateless vessels, would have potential to capture the narcotics trafficking that is at issue and the related money exchanges.[345] This, however, would create a crime of universal jurisdiction which international law would likely not support. But, there is one specific provision addressing terrorist financing, for which the *Criminal Code* asserts *prescriptive* jurisdiction over anyone who provides or collects property (including money) that "will be used, in whole or in part, to carry out" acts

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[341] s. 83.02 – 83.231 *Criminal Code*.

[342] s. 83.01 C*riminal Code*.

[343] s. 7(3.73) – 7(3.75) *Criminal Code*. Section 83.02 of the *Criminal Code*, in combination with subsection 7(3.73), implements Canada's obligations under the *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 197. Canada has referred to "property," a much broader term that "funds" which is used in the *Convention*. It is interesting to note that subsection 3(3.73)(d) takes jurisdiction over a person who commits the act or omission and "after its commission,[is] present in Canada." This seems to give rise to the *male captus bene detentus* debate. This is beyond the scope of this paper but if the prerogative were to be asserted as means to cause a person to be "present in Canada," the conspicuous absence of a provision providing for this enforcement jurisdiction could be troublesome. As well, the reasoning in *Medvedyev* suggests that the *Charter* would likely apply from the time of detention. This is an area for further consideration.

[344] Regarding "threats to the security of Canada," see the *Canadian Security Intelligence Act*, s. 2(c) and the *Security Offences Act*, s. 2(a) as addressed at note 85.

[345] s. 83.02-83.12 *Criminal Code.*

aimed at Canadians and Canadian interests.[346] This provision is *not* geographically restricted.[347] That is, this offence could apply to the activities that Operation Artemis is targeting, if Canada could meet the burden of proof that the persons in the chain of possession of drugs or money were intending to use this property to finance an attack against Canada.[348] Section 83.03 is even more directly on point and addresses making property (including money) available to "facilitate" any terrorist activity. For this offence, Parliament did not provide such a wide jurisdiction as it did with section 83.02; it does not apply to non-Canadians outside of Canada or on a non-Canadian vessel.

It is acknowledged gathering the evidence to facilitate a prosecution under section 83.02 would be a significant challenge and that the *Security Offences Act* is likely of little assistance. Additionally, there does not appear to be any provision in the *Criminal Code* that would allow for extraterritorial enforcement jurisdiction in the circumstances applicable in this Operation. The point, however, is that Parliament has specifically considered the problem or threat that the CAF is addressing in Operation Artemis. In section 83.02, Parliament has legislated and required a nexus to Canada or Canadians. Section 83.03 of the *Criminal Code* creates a broader offence

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[346] Under the heading of "Terrorist Financing: Providing or collecting property for certain activities," the *Criminal Code*, s. 83.02 states:

> Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out
> (a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of "terrorist activity" in subsection 83.01(1), or
> (b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, if the purpose of that act or omission, by its nature or context, is to intimidate the public, or to compel a government or an international organization to do or refrain from doing any act,
> is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

[347] s. 7(3.73)(e) – 7(3.73)(g) and 83.02 *Criminal Code*. With the addition of this Canadian nexus, the offence is not one of universal jurisdiction but is supported by the passive personality and protective principles.

[348] Much admittedly turns on the wording "used to carry out."

but Parliament did not include extraterritorial jurisdiction over non-Canadians on stateless vessels on the high seas.

Moreover, there is one final piece of relevant legislation. In 1994, Canada enacted Bill C-29, and accompanying Regulations, that extended prescriptive *and enforcement* jurisdiction to foreign flagged and stateless vessels, on a particular area of the high seas. This Bill permitted the search and seizure of vessels on the high seas and the prosecution of those on board.[349] Statements made by the Minister of Foreign Affairs and the Minister of Fisheries and Oceans confirmed that the principal target of the Bill was stateless vessels and vessels flying flags of convenience.[350] Additionally, Bill C-8 in 1994 amended the use of force provisions in the *Coastal Fisheries Protection Act* to the effect that a fisheries protection officer can use disabling force against such a vessel when it is reasonable and necessary.[351]

As the result of the arrest of a Spanish fishing vessel on the high seas, the Spanish government commenced an action in the ICJ based on what it alleged was Canada's exercise of jurisdiction on the high seas against ships flying the Spanish flag and Canada's resort to armed force. Canada characterized the dispute as relating to conservation and management measures in respect of fishing vessels. The Court ruled in favour of Canada but this was a jurisdictional

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[349] Bill C-29, *An Act to amend the Coastal Fisheries Protection* Act First Session, Thirty-Fifth Parliament, S.C. 1994, c. 14. Regulations published on 31 May 1994 extended the authority of protection officers to stateless vessels on the high seas. See *Pereira v Canada (Attorney General)*, 2005 FC 1011 (CanLII) at para 59, last accessed 15 April 2014, http://canlii.ca/t/1lklf. But, this jurisdiction was only extended to a particular area of the high seas just outside Canada's Exclusive Economic Zone in order to protect certain "straddling" fish stocks. William Dunlop, "Canada Asserts Jurisdiction over High Seas Fisheries," *IBRU* [International Boundaries Research Institute University of Durham] *Boundary and Security Bulletin* (July 1994), last accessed 22 December 2014, https://www.dur.ac.uk/ibru/publications/download/?id=42.

[350] *Fisheries Jurisdiction (Spain v Canada)*, Judgment, [1998] I.C.J. Rep. 432 at para 77, last accessed 15 April 2014, http://www.icj-cij.org/docket/files/96/7533.pdf. Canada interdicted and seized a Spanish fishing vessel. Charges against the master did not proceed but the owners brought an ultimately unsuccessful civil suit for damages against Canada. *Canada (Procureur général) v Hijos*, 2007 FCA 20 (CanLII), last accessed 15 April 2014, http://canlii.ca/t/1q8jj.

[351] Bill C-8, *An Act to Amend the Criminal Code and the Coastal Fisheries Protection Act)*, First Session, Thirty-Fifth Parliament, S.C. 1994, c.12.

hearing so it did establish the lawfulness of the Canadian action.[352] Significantly, Canada's actions demonstrate the willingness and resolve of the Government to address the threats posed to Canadian interests by stateless vessels on the high seas, through legislation.

A Basis in Canadian Law for this Operation?

The domestic prescriptive jurisdiction for the boarding and search of vessels, *as provided for in UNCLOS,* is derived from the Crown prerogative. Although some may argue that this is not part of the Defence prerogative, this is an international practice that existed since at least the 1958 *Convention on the High Seas*. In Canada, this common practice has never been provided for in statute and must form part of the common law.[353]

Further enforcement actions are not so clear.[354] As mentioned above, it is possible that this Operation was authorized not by exercise of the prerogative, but as assistance to law enforcement by the Governor in Council, in accordance with s 273.6(2) of the *NDA*. But, it does not take long to realize that this course of action would stumble as it leaves the gate. The *Criminal Code,* the *Security Offences Act* and the *CDSA* generally do not support the actions being undertaken, unless a link can be made to terrorist activity targeting Canada or Canadians or

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[352] Prior to the commencement of this case, Canada deposited a document with the UN wherein Canada did not consent to ICJ jurisdiction regarding "disputes arising out of or concerning management measures taken by Canada with respect to fishing vessels [in the relevant area of the high seas]." See *Fisheries Jurisdiction Case (Spain v Canada)* at paras14, 23, 24, and 87.

[353] Recall how prescriptive jurisdiction can be provided in some cases by executive order. Pieter Johannes Jacobus van der Kruit, "Maritime Drug Interdiction in International Law," 16.

[354] If this Operation was authorized under Chapter VII by the UN Security Council, this would raise some interesting issues. Under the *United Nations Act*, R.S.C. 1985, c. U-2, Canada may make Orders in Council to implement decisions of the Security Council taken under Article 41 of the *UN Charter* but there is no such authority for actions taken under Article 42 (armed force). The answer may be that Article 42 was never meant to fight transnational organized crime and a decision of the Security Council under Article 42 is evidence that the action is in response to a threat to international peace and security, versus a law enforcement concern, to the extent these are distinct. Note, however, the case law from the European Court of Human Rights that a Chapter VII authorization must be read in accordance with a state's international human rights obligations and also, presumably, the law of the sea. See *Al-Jedda v the United Kingdom*, no. 27021/08, E.C.H.R. (7 July 2011).

another offence that is classified as a "threat to the security of Canada." Assuming this link could be made; warrants would need to be obtained for the searches. But, most significantly, there is no means to obtain a warrant or take other enforcement action since there is lack of extraterritorial enforcement jurisdiction. Given the complications this regime presents, Operation Artemis must be authorized under the prerogative. Whether this frees the Crown from these statutory provisions is the key remaining question.

If a stateless vessel, within Canadian waters, was to be detained and searched for narcotics and these narcotics later destroyed, this activity would almost certainly be a law enforcement matter. It would be based in the relevant statutory provisions of the criminal law as addressed above.[355] This law would set limits on enforcement action by law enforcement personnel and any CAF members who were directed to assist. The CAF would not be the lead Department since it does not have a law enforcement mandate and Canadian warships do not have independent legal authority to enforce Canadian law.[356] This begs the question, if the CAF is not the lead agency for such an operation in Canadian waters, how is it within the CAF's mandate to assume this function when outside Canada?

As discussed above, the answer is likely that the Crown, that is, the Prime Minister or the Cabinet may exercise the prerogative and expand the mandate of the CAF by authorizing the CAF to conduct operations not normally thought of as being a defence task.[357] Since this is an expansion of the military's role and a zone of some legal risk, this authority from the Prime

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[355] The *Charter* would also apply but that is not addressed in this paper.

[356] LCdr Sandra McLeod, "The Securitization of Migration and the Navy's Emerging Role" (Master of Defence Studies Directed Research Paper, Canadian Forces College, 2012), 89.

[357] A normal defence task would include the exercise of the prerogative to deploy the CAF to conduct a military operation such as exercising the right of visit under *UNCLOS*.

Minister or Cabinet should be specific.[358] That is, there should be specific direction to detain and search stateless vessels for narcotics and for the disposal of the narcotics. However, the lawfulness of this expanded mandate to conduct these tasks is premised on the prerogative not having been displaced or put into abeyance by statute for these activities. This leads to a challenging question: if a statutory basis, that is, the criminal law, would be utilized to conduct this type of operation in Canadian waters, can an identical mission be implemented under the prerogative outside Canadian waters? The answer is not entirely clear.

This author has often heard assertions that the CAF operates in Canada under a statutory mandate to provide assistance to law enforcement, and outside Canada, under the authority of the prerogative. While this may often coincidentally be true, it is just coincidence. A threat may relate to the defence of Canada outside the county just as much as inside.[359] The same arguably holds true with law enforcement; a matter that relates to law enforcement inside Canada is not transformed into a defence matter because the threat, or operation against it, shifts to beyond Canada's borders. When law enforcement occurs extraterritorially, the international legal considerations obviously change dramatically and states face restraints in international law in this respect. But, as the analysis in the first part of this paper demonstrates, international law likely does *not* prohibit the search and seizure of drugs as is occurring in Operation Artemis.

However, unlike international law considerations, if a maritime interdiction operation were to move from inside Canada to outside Canada, the domestic legal limits on the prerogative

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[358] In addition to any risk at international law, the more significant risk arises under domestic law because, at least arguably, the enforcement action being undertaken should be authorized by statute, as discussed further below.

[359] A much used example is another "9-11" scale attack and whether this would be addressed as a criminal act or as the defence of Canada. (Although it would be a crime in either case, the answer to this question determines the use of force paradigm that would be employed.)

arguably do *not* change. Whether internally or extraterritorially, the question remains "whether Parliament has provide[d] by statute for powers previously within the prerogative" or "whether a statute occupies ground formerly occupied by the prerogative." Where this has occurred, Government ". . . must act under and subject to the conditions and limitations imposed by the statute."[360]

One potential response to such questions is that statutes do not occupy the ground because the *Criminal Code* and the *CDSA* are not binding on the Crown. Given the provisions in the *Criminal Code* and the *CDSA* that address justifications for law enforcement personnel to commit offences in enforcing the law, this seems like an absurd proposition.[361] If these *Acts* did not bind the Crown, these provisions would be unnecessary. A more compelling argument is that the prerogative has not been displaced because legislation does not provide jurisdiction over the specific "offences" in question, when they are committed on board non-Canadian vessels on the high seas by non-Canadians.[362]

While this statement is true, the Government has legislated in respect of narcotics and regarding support to, and the financing of, terrorism. Generally speaking, Canada has extended extraterritorial prescriptive and enforcement jurisdiction to offences committed on the high seas by Canadians, and offences on Canadian vessels. Canada has taken an even broader prescriptive jurisdiction over terrorism and criminalized violence that is a threat to the security of Canada and

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[360] *Black v Canada (Prime Minister)*, 2001 CanLII 8537 (Ont CA). See note 287.

[361] *Canada (Department of Fisheries and Oceans) v. Canada (Department of National Defence)*, 1993 CanLII 3097, last accessed 17 April 2014, http://canlii.ca/t/1mqwb. The *Security Offences Act* also arguably intends to bind the Crown as one of its purposes is granting authority to the Attorney-General to conduct a prosecution.

[362] Another argument may be that the CAF has this expanded mandate when operating extraterritorially because the RCMP does not have the lawful authority to implement such a mission outside Canada. This may be true in respect of a *mandate*, in that, the Government can assign new tasks to the CAF. But, the lack of legal authority of the RCMP to undertake extraterritorial enforcement activities does somehow authorize the CAF to undertake the same activity in the absence of statutory authority or a lawful exercise of the prerogative.

terrorist acts directed at Canada and Canadians, wherever occurring. Canada has extended this reach in respect of one particular offence regarding the financing of terrorism.

But, Canada chose not to extend its jurisdiction, as it could have done in accordance with the *UN Narcotics Convention,* over foreign flagged vessels. Canada has also made no attempt to extend jurisdiction over stateless vessels trafficking in narcotics as the Council of Europe has done.[363] This is even more noteworthy since in addressing a previous threat of over-fishing, Canada did enact legislation providing for prescriptive and enforcement jurisdiction over stateless vessels on the high seas.

Conclusion Regarding Canadian Domestic Law

There is no doubt that the Crown, even under a peace-time regime, has the authority to deploy the CAF to conduct flag verification and exercise the right of visit as provided for in *UNCLOS*. The Crown could even extend the CAF's mandate to include tasks not traditionally thought of as within the defence mandate. But this is where the prerogative collides with statute law.

Canada has put in place a complex statutory regime addressing extraterritorial jurisdiction over narcotics, terrorist acts and terrorist financing, and offences that are a threat to the security of Canada. Arguably, this regime has consciously addressed the need for a Canadian nexus and has consciously not been extended to stateless vessels on the high seas and non-Canadians on board these vessels. The statutes that are in place both permit Government action but also restrain it, either explicitly, but usually implicitly. This occurs by the statutes setting out

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[363] *Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,* (1 May 2000). See note 145.

who exercises authority, how it is to be exercised (enforcement jurisdiction and mechanisms), over which actions or omissions (what is criminalized), committed by which persons (Canadians or every one) and whether the reach is limited to Canada or extended to the high seas, or even within another state.

Unfortunately, none of the provisions of the statutory law authorise the Operation Artemis activities. Section 83.02 of the *Criminal Code* may provide a statutory basis for prescriptive jurisdiction, albeit with a challenge of establishing a nexus to Canada, but the *Criminal Code* does not grant an accompanying extraterritorial enforcement jurisdiction and criminal law procedures are not being followed.[364] Rather, the prerogative is being used to undertake what the statutory regime does not authorize or makes too difficult. The words from the 2006 *Khadr* decision would seem to apply, ". . . what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?" This is what appears to have occurred in Operation Artemis, leaving its legality in doubt.

[364] As discussed, extraterritorial enforcement jurisdiction is provided by s. 477.3 of the *Criminal Code*.

CONCLUSION

Canada is conducting maritime interdictions that target narcotics smuggling in order to keep drugs of Canadian streets and to cut-off a source of financing for criminal and terrorist groups. Although it is not possible to classify this Operation as relating primarily to law enforcement, national security or national defence, the tasks conducted are of a law enforcement nature, and are an exercise of extraterritorial enforcement jurisdiction.

An exercise of extraterritorial enforcement jurisdiction by any state requires lawful prescriptive jurisdiction, and a lawful basis in domestic and international law. The right of visit under *UNCLOS* in respect of stateless vessels is well established in international law and its domestic legal basis for Canada is simply the exercise of the prerogative. However, the further enforcement action that is being taken is less clear. There is no explicit basis in international law to search for, and seize, illicit narcotics as is occurring in Operation Artemis. Some action seems to be contemplated against stateless vessels smuggling narcotics but *UNCLOS* and the *UN Narcotics Convention* do not specify what is permitted. Given the explicit provisions authorizing action against vessels engaged in piracy, unauthorized broadcasting and the slave trade, this silence is not reassuring. The contemplated action could merely be coastal states forbidding entry into their waters and the use of their ports. Additionally, albeit in the 1970s, states negotiating *UNLCOS* did not accept proposals to authorize enforcement action against vessels trafficking in narcotics. On the contrary, since the 1970s, the U.S. has taken aggressive enforcement action, but in accordance with a solid basis in domestic law and, at least, an implicit national nexus, with operations conducted along routes known to be used for trafficking drugs into the U.S.

With respect to this Operation, Canada asserts that there is a national nexus: keeping drugs of Canadian streets and reducing funding to criminal and terrorist groups. However, at

least in the public domain, there is no evidence to this effect. Additionally, even if CAF operations are reducing terrorist funding, there is no demonstrated link to Canada other than a presumably ubiquitous, yet vague, threat from terrorism. Because narcotics trafficking, whether in support of terrorism or otherwise, is not a crime of universal jurisdiction, the absence of a demonstrable nexus to Canada, means that this operation is not supported by one of the recognized principles of extraterritorial jurisdiction. This creates uncertainty as to the lawfulness of the exercise of enforcement jurisdiction. However, it is well established that stateless vessels are without protection and that narcotics are, at least nearly, universally unlawful. The *UN Narcotics Convention* recognizes that the trafficking of drugs is an "international criminal activity" and this *Convention* clearly contemplates states taking action against the stateless vessels that are involved. Therefore, an assertion of prescriptive and enforcement jurisdiction over this *illicit cargo* is likely not unlawful. However, international law is too uncertain to conclude with any confidence that these seizures are lawful.

This lack of certainty and consensus about the lawfulness of enforcement action against stateless vessels could arise from the vessels, their crews and cargo being viewed as "a unit." Such an approach would mean that an assertion of jurisdiction over the vessel, purportedly leads to criminal jurisdiction over the crew. Some states are likely cautious in this regard since, in the absence of one of the principles of extraterritorial jurisdiction, and a valid basis in domestic law, there are no grounds to assert jurisdiction over these persons who are themselves, not stateless. This lack of a basis to assert jurisdiction means that there is no lawful basis to use force

regarding the crew except as is reasonably necessary in self-defence.[365] Additionally, any purported right to seize or destroy the vessel is, at best, controversial and gives rise to the practical problem of what to do with the crew.

This leads to the conclusion that jurisdiction should only be asserted over the unlawful narcotics. This is the lowest risk method for any such interdiction. Of course, a demonstrable link to Canada bolsters this assertion. However, it is impossible to take jurisdiction over the cargo without likely assuming "jurisdiction" (as IHRL understands this term) over the crew. Because the CAF are likely employing, at least tacit, coercion during these interdictions as a means of self–defence and controlling the crew, and because of the possibility for violence, there is the potential for violations of Canada's human rights obligations.[366] At least, there is the potential for such allegations.

If a crewmember were to be injured or killed, his state of nationality could assert jurisdiction against an involved CAF member under the passive personality principle. If the state was able to obtain custody of the CAF member, they could be tried in accordance with that state's laws. Such a case is currently on going with Italian service members being tried for murder in India.[367] Additionally, in international law, Canada would be responsible for CAF members acting in an official capacity even if they have exceeded their orders or authority and

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[365] But, as discussed, the lawfulness of the boarding likely affects the lawfulness of such a use of force. Similarly, the law of the sea permits reasonable and necessary force to board a suspected stateless vessel, but only when there is a lawful basis to board, that is, "reasonable grounds for suspecting" that the vessel is stateless.

[366] This may give rise to the application of the *Charter*.

[367] On 15 February 2012, while 20.5 nautical miles off the Indian coast, the Italian military security detachment embarked on *M/V Enrica Lexie* mistook an Indian fishing vessel for pirates. They fired on the vessel and killed two Indian citizens. At the time of writing proceedings are underway in the Indian court. See "Marines' case: Italy protests 'delay', recalls envoy," *The Times of India* (19 February 2014), last accessed 8 April 2014, http://timesofindia.indiatimes.com/india/Marines-case-Italy-protests-delay-recalls-envoy/articleshow/30641045.cms.The Indian Supreme Court rejected an argument of sovereign immunity in a hearing on jurisdiction but ruled that this issue would be re-examined at trial. See *Republic of Italy and Others v. Republic of India and Others*, Writ Petition (Civil) No. 135 of 2012 (18 January 2013), last accessed 6 April 2014, http://piracylaw.files.wordpress.com/2013/01/20130118-indian-supreme-court-judgement-enrica-lexie.doc.

the state of nationality of the crew could seek redress on their behalf.[368] In 1999, the International Tribunal for the Law of the Sea, in the *M/V Saiga* case, awarded more than US$2,000,000 in damages against Guinea to compensate the flag state (Saint Vincent and the Grenadines), the vessel's owner, and those on board for their injuries, unlawful detention and arrest, and ill-treatment caused by the excessive force used during an interdiction.[369]

There is also potential for litigation in Canadian courts.[370] Not only do the Canadian courts have the jurisdiction to review the use of the prerogative, they can adjudicate on claims against the Crown arising from unlawful detention or injury.[371] As discussed, not all exercises of the prerogative are subject to judicial review. However, the Courts would appear to have jurisdiction over an allegation that a CAF member violated an individual's rights, or a challenge that CAF actions were beyond what the prerogative authorizes.

Legal risks are mitigated if: (1) the operation is conducted in accordance with CAF doctrine, which recognizes that any use of force in self-defence must be reasonable and necessary; (2) the operation is planned and conducted to minimize the potential for the use of force, and (3) the operation is lawful. The risks outlined above and these mitigation measures are

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[368] Sovereign immunity is *not* generally a bar to proceedings before international tribunals. Malcolm D. Evans, *International Law* at 349. See also International Law Commission, "Draft Articles on Responsibility for States for Internationally Wrongful Acts," *General Assembly Resolution 56/83* (12 December 2001), Annex in particular articles 4, 7, 31 and 32. The *Commentary* at Article 7(2) clarifies that, "The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence. It is so even if other organs of the State have disowned the conduct in question." Last accessed 6 April 2014, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf . With regard to the state of nationality seeking redress on behalf of their citizens see International Law Commission, "Text of the Draft Articles on Diplomatic Protection." *Report of the Fifty-Eighth Session, UNGA OR, Sixty-First Session, Supplement No. 10*, UN Doc. A/61/10 (2006), last accessed 25 April 2014, http://legal.un.org/ilc/reports/english/a_61_10.pdf.

[369] *M/V Saiga*, para 172 and 183(12).

[370] See note 299.

[371] *Crown Liability and Proceeding Act*, R.S.C., 1985, c. C-50.

not unique to Operation Artemis and the CAF can address points (1) and (2) through professional planning and conduct. However, this Operation raises concerns regarding point (3). As discussed, *international law* likely does not prohibit the assertion of jurisdiction over the unlawful cargo. That said, the necessary prescriptive and enforcement jurisdiction appear to be lacking in *Canadian law*.[372]

The Government likely authorized this Operation through use of the prerogative. Yet, the prerogative can be displaced when a statute is enacted and covers the same ground. In this case, Parliament has provided a statutory law enforcement regime that applies to drug trafficking and terrorism related offences. This regime provides for prescriptive jurisdiction in respect of terrorist financing but this jurisdiction only applies in limited circumstances outside Canada. One terrorism related offence in the *Criminal Code* has the potential to encompass the conduct targeted by this Operation, but only if there is a demonstrable link between this conduct, and Canada or Canadians.[373] Moreover, the extraterritorial prescriptive jurisdiction provided by the *Criminal Code* in respect of drug trafficking does not extend to non-Canadians on stateless vessels on the high seas. In addition to the gaps in prescriptive jurisdiction, extraterritorial enforcement jurisdiction for criminal offences simply does not extend to non-Canadians on stateless vessels on the high seas. This is in sharp contrast with the fisheries legislation enacted in 1994 that provides prescriptive and enforcement jurisdiction over stateless vessels and their crews, on the high seas.

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[372] Recalling that for enforcement jurisdiction to exist, there must be lawful prescriptive jurisdiction. As stated previously, the lawfulness of the right of visit in accordance with UNCLOS is *not* in doubt.

[373] As discussed, that is s. 83.02 of the *Criminal Code*, "Providing or Collecting Property for Certain Offence." The extraterritorial reach is provided by s. 7(3.73)(e)-(g).

Furthermore, if law enforcement personnel undertook these identical enforcement activities in Canadian waters, or outside Canada on a Canadian flagged vessel, the operation would almost certainly be conducted on the authority of, and in accordance with, the relevant statutes. CAF members assisting law enforcement personnel would be subject to the same legal limitations. Therefore, it is difficult to see how the complex regime established by the criminal law has not displaced the prerogative for the law enforcement activities undertaken. This leads to significant doubt as to how the CAF can bypass these statutory constraints and lawfully conduct these tasks halfway around the world entirely through reliance on the prerogative.

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