

Interdiction of Vessels on the High Seas*

LOUIS B. SOHN†

I. The Problem

A. PRESIDENTIAL PROCLAMATION

On September 29, 1981, President Reagan issued a proclamation declaring that the “entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.”¹ The reason for this proclamation was that “the continuing illegal migration by sea of large numbers of undocumented aliens” constitutes “a serious national problem detrimental to the interests of the United States,” as these arrivals “have severely strained the law enforcement resources of the Immigration and Naturalization Service [INS] and have threatened the welfare and safety of communities” in the southeastern United States.² The means chosen to protect the interests of the United States and to insure the effective enforcement of its laws was through “international cooperation to intercept [on the high seas] vessels trafficking

*This comment is a slightly edited version of a report originally prepared for the 1983 Annual Meeting of the Section of International Law and Practice by the author in consultation with Messrs. Ronald H. Bonaparte and David Hiller. It deals only with the law of the sea aspects of this question; it does not consider the separate question of whether assisting a foreign state in recapturing its nationals who escaped from it constitutes a violation of international human rights law or of the rules of international law relating to refugees. The author is solely responsible for the views expressed in this report; it has not been officially approved by the Section of International Law and Practice.

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

¹Presidential Proclamation 4865 of Sept. 29, 1981, Relating to High Seas Interdiction of Illegal Aliens, para. 4. 46 Fed. Reg. 48107 (1981); 3 C.F.R. 1981 Comp., at 50-51; reprinted in 8 U.S.C.A. § 1182 note.

²*Id.* para. 1.

in illegal migrants,” and to conclude “cooperative arrangements with certain foreign governments” for this purpose.³

B. EXECUTIVE ORDER

To implement this proclamation, President Reagan simultaneously issued an Executive Order, authorizing the Secretary of State “to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.”⁴ The Secretary of Transportation was authorized to issue appropriate instructions.⁵

1. “Vessels” Covered

Only certain “defined” vessels are subject to interdiction under the Executive Order.⁶ First, vessels of the United States are clearly within the jurisdiction of the United States. They are “vessels documented under the laws of the United States,⁷ or numbered as provided by the Federal Boat Safety Act of 1971 as amended.”⁸ Second, the Order also seems to consider as vessels of the United States certain vessels not falling into the first category, i.e., foreign vessels that are “owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof.” But the Order expressly exempts any such vessel that “has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958.”⁹ Third, relying on Article 6(2) of the Convention on the High Seas, the Order subjects to

³*Id.* paras. 2-3.

⁴Executive Order 12324 of Sept. 29, 1981, Relating to Interdiction of Illegal Aliens, § 1. 46 Fed. Reg. 48109 (1981); 3 C.F.R. Comp. 1981, at 180-82; *reprinted in* 8 U.S.C.A. § 1182 note.

⁵Executive Order, *id.* at § 2(a).

⁶*Id.* at § 2(b).

⁷The Vessel Documentation Act of Dec. 24, 1980, specifies which vessels may be “documented” under that law. 94 Stat. 3453 (1980); 46 U.S.C. § 65 *et seq.*; recodified in 1983 in § 12101 *et seq.*

⁸The Federal Boat Safety Act of Aug. 10, 1971, amended in 1980, provides for the numbering of certain undocumented vessels. 85 Stat. 213 (1971), amended by 94 Stat. 1983 (1980); 46 U.S.C. § 1451 *et seq.*

⁹13 U.S.T. 2312; T.I.A.S. No. 5200; 450 U.N.T.S. 82. Article 5 of the Convention on the High Seas provides that each state is entitled to fix the conditions for the grant of its nationality to ships, but there must exist “a genuine link between the State and the ship”; in particular, “the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flags.” These obligations of the flag state have been made more precise in Article 94 of the United Nations Convention on the Law of the Sea, of Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, at 39 (1982); 16 I.L.M. 1261 (1982). *Quaere* whether the reference in the Executive Order to Article 5 is meant to authorize the Coast Guard to board vessels owned by United States citizens or corporations that sail under a foreign flag if there is no genuine link with the flag state.

United States jurisdiction not only vessels without nationality but also “vessels assimilated to vessels without nationality,” i.e., vessels which sail “under the flag of two or more states, using them according to convenience.”¹⁰ And fourth, the Order applies also to vessels of foreign nations with which the United States had made “arrangements authorizing the United States to stop and board such vessels.”¹¹

2. Authorized Actions

The Executive Order authorizes the Coast Guard to take the following interdiction steps “outside the territorial waters of the United States”:¹²

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that no person who is a refugee will be returned without his consent.

C. REFUGEES

It may be noted that the Executive Order provides expressly that “no person who is a refugee will be returned without his consent.”¹³ In addition, the Executive Order authorizes the Attorney General, in consultation with the Secretary of State and the Secretary of Transportation, to “take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.”¹⁴

¹⁰Article 6(2) of the Convention on the High Seas merely assimilates a ship with more than one flag to a ship without nationality. Article 22 of the Convention on the High Seas, which authorizes the boarding of certain foreign vessels on the high seas, does not mention among them either such ships or ships without nationality. Such authorization is expressly given, however, by the 1982 Convention on the Law of the Sea, *supra* note 9, Article 110(1)(d).

¹¹Executive Order, *supra* note 4, at § 2(b)(3).

¹²*Id.* at § 2(c) & (d).

¹³*Id.* at § 2(c)(3).

¹⁴*Id.* at § 3. During the preparation of the Proclamation and the Executive Order, the Office of Legal Counsel of the Department of Justice prepared a legal opinion on the various legal issues raised by the interdiction program, which concluded, *inter alia*, that “the provisions relating to asylum and exclusion proceedings do not apply on the high seas,” and that the proposed program will satisfy United States “obligations to those refugees fleeing from their homelands.” See Coast Guard Oversight—Part 2: Hearings before the Subcomm. on Coast

By an exchange of notes on September 23, 1981, which came into force on the same day, the United States agreed with Haiti on the establishment of a cooperative program of interdiction and selective return of certain Haitian migrants and vessels involved in illegal transport of persons trying to enter the United States from Haiti.¹⁵

One United States Coast Guard cutter was immediately stationed off the Northwest coast of Haiti; it was relieved, successively, by other Coast Guard vessels; and it was assisted by air patrols by two helicopters and a C-130 aircraft. According to congressional testimony by Rudolph W. Giuliani, Associate Attorney General, when suspicious vessels are located, a Coast Guard boarding party is dispatched to establish the registry, condition and destination of the vessel. Specially trained INS personnel—two officers and two Creole interpreters—are responsible for determining the status of people on board interdicted vessels.¹⁶ They try to elicit information from all persons concerned upon which a claim to refugee status might be based by asking several questions, including: “Why did you leave Haiti?”; “Why do you wish to go to the United States?”; and “Is there any reason why you cannot return to Haiti?”¹⁷ The INS interviewers are also instructed to be “constantly watchful” for any indication that a person may qualify as a refugee and to conduct private interviews to ascertain whether any such person does in fact have a claim to refugee status.¹⁸ If there is an indication that a legitimate claim of refugee status exists (i.e., that there is a well-founded fear of persecution upon return to Haiti for reasons of race, religion, nationality, membership within a particular social group or politi-

Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 1st Sess., at 5 (statement of David Hiller, Special Assistant to the Attorney General, Department of Justice). See also Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Regarding Proposed Interdiction of Haitian Flag Vessels, Aug. 11, 1981, at 2, 8 (unpublished doc. in Subcomm. files).

¹⁵See 81 DEP'T STATE BULL. No. 2057, at 77 (1981). In that agreement the Haitian government authorized the United States to board Haitian vessels and to investigate the status of those on board the vessel, and to detain the vessel and those on board if the results of the investigation suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed. The detained vessel and persons may be returned to a Haitian port or released on the high seas to representatives of the Haitian government. It was understood that the United States government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status. The United States agreed to the presence of a representative of the Haitian Navy as liaison aboard the United States vessel engaged in the implementation of the cooperative program.

¹⁶Coast Guard Operations: Hearings Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2d Sess., at 186, 190.

¹⁷Memorandum to All INS Employees Assigned to Duties Related to Interdiction at Sea from Doris M. Meissner, Acting Deputy Commissioner, Immigration and Naturalization Service, Regarding INS Role in and Guidelines for Interdiction at Sea, April 5, 1982, revising Guidelines issued on Oct. 6, 1981. The memorandum contains the caveat that the Commander of the Coast Guard vessel may prevent the interviews if he feels it would not be “safe and practicable.”

¹⁸*Id.*

cal opinion), the person is to be brought to the United States in order to enable him/her to file a formal application for asylum. Others are returned to Haiti by the Coast Guard cutter, as interdicted vessels are usually dangerously overloaded, not seaworthy and manned by people without adequate navigation skills. As a result of the interdiction effort, the number of undocumented Haitians arriving illegally in the United States by non-intercepted boats has diminished according to the Immigration and Naturalization Service from 15,093 in 1980, and 8,069 in 1981, to only 95 in the first six months of 1982. All the persons on board intercepted boats were returned to Haiti and no one was found to be entitled to claim asylum.¹⁹

D. PROPOSED LEGISLATION

The main bill before Congress for revising the Immigration and Nationality Act, the Simpson-Mazzoli bill,²⁰ does not contain any provisions authorizing emergency powers or interdiction at sea. There are, however, two separate titles of the Administration bill, which bear the headings, respectively, of the "Immigration Emergency Act" and the "Emergency Interdiction Act."²¹ The Immigration Emergency Act would authorize the President

¹⁹Coast Guard Operations: Hearings Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2d Sess., at 186-98; Letter from Admiral J. S. Gracey to Congressman Gerry E. Studds, Jan. 13, 1983, enclosing a Coast Guard report on Haitian Migrant Interdiction Operation, Oct. 1, 1982. See also Giuliani, *The Interdiction Program*, 30 INS Rep. No. 4, at 3 (1982); *Haitian Asylum-Seekers and U.S. Interdiction Policy*, 14 Refugees 8 (U.N. High Comm'r for Refugees, Feb., 1983). According to the latter report: between October 1981 and September 1982, a total of 117 boats were boarded by the Coast Guard, on some of them were found groups of illegal entrants on board, no one so stopped has filed for asylum, and 186 persons were returned to Haiti, where the Department of State monitors them for a year and has not yet found that any of them have experienced retribution or ill treatment. *But cf. Haitian Migrant Interdiction Operation*, Staff Report on Study Mission to Haiti, January 7-January 12, 1982, at 20, prepared by Bill Woodward, Professional Staff, Subcommittee on Coast Guard and Navigation, House Committee on Merchant Marine and Fisheries. Mr. Woodward witnessed the interdiction of the *Grace a Dieu* and reported that the migrants "fully expected to be turned over to legal authorities upon their return and probably sent to jail." Mr. Woodward does not, however, report if these migrants were in fact sent to jail; and there seems to be some confusion surrounding this particular incident—the Attorney General's office informed Congress that the ship was returning to Haiti, not going to the United States, and for that reason it was not necessary to ask its passengers whether they were in fear of returning to Haiti. Letter from R. W. Giuliani, Associate Attorney General to Congressman Gerry E. Studds, Chairman, Subcommittee on Coast Guard and Navigation, March 23, 1982.

²⁰The "Immigration Reform and Control Act of 1982," S. 2222 (introduced by Senator Simpson) and H.R. 6514 (formerly 5872) (introduced by Congressman Mazzoli), 97th Cong., 1st Sess.

²¹A Bill to Revise and Reform the Immigration and Nationality Act, and for Other Purposes ("Omnibus Immigration and Control Act"), S. 1765 (introduced by Senator Thurmond on Oct. 22, 1981) and H.R. 4832 (introduced by Congressman Rodino on Oct. 22, 1981), 97th Cong., 1st Sess. The provisions of the Senate and House bills are identical. Title VII (The Immigration Emergency Act) would insert in Chapter 4 of Title II of the Immigration and Nationality Act (8

to "declare an immigration emergency with respect to any specifically designated foreign country or countries or geographical area or areas," if he should determine that "a substantial number of aliens who lack documents authorizing entry to the United States appear to be ready to embark or have already embarked for the United States," and that the Immigration and Naturalization Service will not be able to respond effectively to the influx of these aliens.²² To prevent the embarkation of the illegal aliens, the President would be entitled to prohibit departure of certain vessels or aircraft from the United States for the designated foreign country or foreign geographical area, and may order their interception while en route and their return to the United States or any other reasonable location. The vessels and aircraft subject to such order are all United States vessels and aircraft, and any other vessels and aircraft which are "owned or operated by, chartered to, or otherwise controlled by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any political subdivision thereof."²³ They may be intercepted "beyond the territorial limits of the United States including on the high seas."²⁴ During the immigration emergency, the President may also order the closing or sealing of any harbor, port or airport which may be used as a point of departure from the United States to a designated foreign country or foreign geographical area, should this be necessary to prevent the arrival in the United States of inadmissible aliens. No vessel or aircraft would be permitted to depart from a closed or sealed harbor, port or airport without special permission, which would be only granted if it can be clearly shown that the vessel or aircraft is not destined for the designated foreign country or foreign geographical area.²⁵ Any vessel or aircraft subject to these provisions may be stopped by any United States agency or "military component," which would be entitled to board, inspect and seize the vessel or aircraft, and arrest persons, notwithstanding any other provision of the law.²⁶

The proposed Emergency Interdiction Act would authorize the President, in order to prevent illegal migration of aliens, "to conclude agreements with other countries for the purpose of preventing such illegal migration."²⁷ In addition, it would authorize the President to "direct the Coast Guard or any other Federal Agency including the Army, Navy and

U.S.C.) new §§ 240A-240E (8 U.S.C. §§ 1230A-1230E); and Title X (The Emergency Interdiction Act) would amend subsection (f) of § 212 of the Immigration and Nationality Act.

²²*Id.*, at § 240A(a).

²³*Id.*, at § 240B(a)(1). A United States vessel or aircraft is any vessel or aircraft "documented, registered, licensed or numbered under the laws of the United States or any political subdivision thereof." *Id.*, at § 240E(4).

²⁴*Id.*, at § 240B(g).

²⁵*Id.*, at § 240B(b).

²⁶*Id.*, at § 240B(d).

²⁷*Id.*, at proposed § 212(f)(1).

Air Force, to stop and examine, on the high seas vessels of the United States, vessels subject to United States jurisdiction,²⁸ or foreign-flag vessels for which the United States government has an arrangement authorizing such action.²⁹ Upon boarding, the Coast Guard or other authorized Federal Agency "may make inquiries of those on board, examine documents, and take such actions as are necessary to establish the registry, condition, and destination of the vessel and the status of those on board the vessel."³⁰ Departing from the language of the Proclamation, the proposed law would provide that when the measures taken "indicate" (instead of "when there is reason to believe") that either an offense against United States immigration laws has been committed, or "an offense under the laws of a foreign country with which the United States has an agreement to assist is being committed" (another novel provision, contrary to the tradition that a country does not help to enforce the penal laws of another country), the interdicting authority "may return the vessel and passengers to the country from whence they came or to some other location."³¹ The word "may" indicates that such return is discretionary, but the arrangement with the other country may contain an obligation to return all interdicted vessels and their passengers. The proposed law, however, makes clear that an "alien who qualifies as a refugee under the terms of the United Nations Convention and Protocol Relating to the Status of Refugees may not be returned to a country where such person's life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion."³²

As noted above, the 1981 Executive Order stipulates that the United States must comply with its obligations concerning "those who genuinely flee persecution in their homeland" and as mentioned above, the guidelines issued pursuant to this order carry out this goal. Similarly, as also mentioned earlier in this text, the proposed legislation would protect those who qualify as refugees under the United Nations Convention and Protocol.

II. International Law Issue

Thus, assuming that the immigration officers on board the cutters act in accordance with their instructions, the only issue is whether the interdiction

²⁸For the definition of "vessel of the United States" and "vessel subject to the jurisdiction of the United States," proposed § 212(f) refers to 21 U.S.C. § 995b, but there is no such provision. For the latest discussion of the phrase "vessel of the United States," see *United States v. Seafoam II*, 328 F. Supp. 1133, 1136-37 (D.C. Alaska, 1982) ("the definition was not meant to include a foreign-flag vessel" for the purposes of the Fishery Conservation Act of 1971).

²⁹The Emergency Interdiction Act, *supra* note 18, proposed § 212(f)(2), first sentence.

³⁰*Id.*, at proposed § 212(f)(2), second sentence.

³¹*Id.*, at proposed § 212(f)(2), third sentence.

³²*Id.*, at proposed § 212(f)(2), last sentence.

procedure itself violates international law. The Executive Order applies on its face only to vessels under the United States flag, to those owned by United States nationals which are not sailing under a legitimate foreign flag (subject to certain difficulties about "flags of convenience"), to those that are without nationality or are assimilated to such vessels because of an attempt to fly more than one flag, and to those flying the flag of a country which has authorized the United States to stop and board them. Jurisdiction under the proposed legislation is similar, except that it refers not only to vessels "of the United States" but also to vessels "subject to the jurisdiction of the United States."³³ Under international law, as codified in 1958 (and strengthened in 1982), such vessels can be stopped and boarded by United States Coast Guard cutters. Of course, if the suspicions prove to be unfounded, the vessel is to be compensated for any loss or damage that may have been sustained.³⁴ As noted above, there might be a violation of international law if a vessel owned in whole (or even only in part) by U.S. nationals has been stopped on the high seas without permission of the flag state, and it is doubtful that the United States could rely on the lack of genuine link. At the time of ratification of the Convention on the High Seas, the United States made it very clear that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state."³⁵ There can be no doubt, however, that boarding a foreign vessel with the consent of the flag state and in accordance with an agreement between the two states concerned is not a violation of international law.³⁶

Except for the possible problems concerning whether the Coast Guard may board vessels owned by United States citizens or corporations which sail under a foreign flag, the 1981 Executive Order and the proposed legislation do not, on their face, constitute violations of international law.

³³See *supra* note 28.

³⁴Article 22(3) of the Convention on the High Seas provides expressly for such compensation. There is an identical provision in Article 110(3) of the 1982 Convention on the Law of the Sea. According to Congressional testimony among the first 50 vessels boarded there were only two which contained groups of illegal entrants. Coast Guard Operations Hearing, *supra* note 16, at 199. The other 48 vessels might have been entitled to compensation for an unwarranted delay in their voyage if they could prove that some damage has been sustained.

³⁵Executive Report No. 5: Law of the Sea Conventions, 106 CONG. REC. 11189, 11190 (86th Cong., 2d Sess., 1960), *quoted in* 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 14-15 (1968). The Restatement of Foreign Relations Law of the United States Revised, Tentative Draft No. 3 (1982), at 68 concludes a review of this subject by stating: "International law probably does not permit a state to assert authority with respect to a vessel registered in another state but owned by its nationals on the ground that there is no genuine link between the vessel and the flag state."

³⁶It may be noted that in 1959, on Panama's request, the Council of the Organization of American States authorized a patrol by vessels of Colombia and the United States in Panamanian jurisdictional waters with power to detain any vessels approaching Panamanian shores for purposes that may constitute an invasion. The states concerned agreed that a Panamanian official will be carried on board the patrol boats to "support Panama's authorization to detain vessels on her behalf." 4 WHITEMAN, DIGEST OF INTERNATIONAL LAW 5-6 (1965).

There is danger, however, that its provisions might be interpreted by courts in a way similar to those relating to the boarding of foreign vessels and the arrest of aliens on board those vessels for conspiring to import narcotic drugs to the United States.³⁷ Prior to that, the United States has run into similar difficulties with foreign countries in enforcing the prohibition laws, but the Supreme Court finally decided that a treaty with the United Kingdom should prevail over prior United States legislation (Tariff Act of 1922).³⁸ Similarly, it was decided that the Anti-Smuggling Act of 1935³⁹ should not be applied to vessels of nations with whom prior treaties on the subject have been concluded.⁴⁰

III. Conclusions

To avoid future conflicts with other countries about the effect of the proposed legislation, the powers of enforcement to be conferred by that legislation should not extend to foreign vessels owned by United States nationals, and in no case should United States courts have jurisdiction over persons arrested on board foreign vessels on the high seas without prior consent of the flag state.

³⁷See *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978), amplified *per curiam* 588 F.2d 100 (5th Cir. 1979) (the court refused to apply the 1958 Convention on the High Seas to the seizure of a Colombian ship, *inter alia*, on the ground that Colombia did not ratify that convention); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, 444 United States 832 (1979) (the court refused to apply the 1958 Convention on the High Seas to a vessel registered in a British territory, although the United Kingdom was a party to the convention, on the ground that the convention should not be considered as self-executing in view of long United States tradition of asserting limited jurisdiction over foreign vessels on the high seas); *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (a decision by 23 judges of the 5th Circuit's Court of Appeal, sitting en banc designed to "harmonize the discordant precedent that has evolved in the Fifth Circuit"; although Panama was not a party to the 1958 Convention on the High Seas, the seizure of a Panamanian vessel on the high seas would have been a violation of the "common law" of the sea except for the fact that Panama consented to the seizure; in any case, according to the court, international common law obviously is not self-executing in the United States, although a foreign sovereign has the right to object to any prosecution founded on a search or seizure that violated international law).

³⁸*Cook v. United States*, 288 U.S. 102 (1933). But the court in *Postal*, *supra* note 26, at 875-84, distinguished the *Cook* case on the ground that the treaty there was more clearly self-executing than the Convention on the High Seas.

³⁹49 Stat. 524; 19 U.S.C. §1701 *et seq.* See also *id.* §§ 483(1) and 1586(b).

⁴⁰*The Reidun*, 14 F. Supp. 771 (1936) (the Anti-Smuggling Act was not intended to extend jurisdictional rights of the United States beyond those agreed with Treaty Nations). Concerning the Norwegian complaint against Reidun's arrest, see 1936 U.S. Foreign Relations, vol. I, at 439-52. In protesting against the enactment of the Anti-Smuggling Act, the British government stated that "under international law a country has no right to interfere with foreign ships outside the limits of territorial waters." 1935 U.S. Foreign Relations, vol. II, at 4-5. Later the British government added that "the United States cannot be held in international law to have the right, by virtue of municipal legislation, to extend beyond the three mile limit, as is done in the present bill, the area within which jurisdiction may be exercised over foreign vessels." *Id.* at 8.

