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BULLETS FOR BEANS: HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT IN NATURAL DISASTERS

Lieutenant Commander Tahmika Ruth Jackson*

Cyclone Nargis struck the southern rice-growing region of Myanmar, formerly known as Burma, with devastating force on May 2 and 3, 2008.¹ Early estimates of 50,000² to 77,000³ dead were overly optimistic. Nearly 140,000 people were killed or categorized as missing as a result of the cyclone.⁴ The international community mobilized itself quickly and efficiently, with millions of dollars worth of aid arriving within days. Despite these efforts, death tolls mounted as relief workers waited and aid resources remained unused because the ruling military *junta* regime refused to let outside aid into the country.⁵ Aid that was delivered did not make it to the starving, sick and wounded in the streets but was impounded by the military regime.⁶ U.S. Navy ships languished

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¹ OCHA Situation Report No. 46, United Nations, Office for the Coordination of Humanitarian Affairs, Myanmar Cyclone Nargis (Aug. 21, 2008) *available at* <http://ochaonline.un.org/MyanmarSituationReports/tabid/4600/default.aspx>.

² Pacific Disaster Center, Death Toll from Cyclone Nargis Estimated to be 50,000 or More, PDC Updates, May 7, 2008, <http://www.pdc.org/PDCNewsWebArticles/2008/Nargis/nargis.htm>.

³ Ian MacKinnon and Rachel Stevenson, *U.N. to Hold Emergency Summit on Burma Aid, says Brown*, GUARDIAN (London), May 15, 2008. *See also* OCHA Situation Report No. 29, United Nations, Office for the Coordination of Humanitarian Affairs, Myanmar Cyclone Nargis (Jun. 9, 2008) *available at* <http://ochaonline.un.org/MyanmarSituationReports/tabid/4600/default.aspx>.

⁴ OCHA Situation Report No. 46, *supra* note 1.

⁵ Andy Saputra and Mike Mount, *U.S. Marines: Aid Begins to Trickle into Myanmar*, CNN.COM, May 15, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/05/14/myanmar.aid/index.html>.

⁶ Alan Brown, Graeme Jenkins and Gethin Chamberlain, *Burma Generals Hijack Cyclone Relief Efforts*, TELEGRAPH.CO.UK, May 10, 2008, *available at* <http://www.telegraph.co.uk/news/>

off the coast with fresh water, supplies, and expertise as their offers to help were rebuffed.⁷ By May 9, the failed response of the Burmese *junta* regime was so extreme and the resultant avoidable death toll so high, French Foreign Minister Bernard Kouchner⁸ and forty-three U.S. lawmakers⁹ appealed to their governments for forced intervention to deliver humanitarian aid to the survivors. Until aid was eventually accepted days later, the choices had seemed bleak as the disaster unfolded: should countries morally appalled by the mounting death tolls continue to let aid rot off the coast, or should they deliver that aid at the point of a gun to affected Myanmar civilians in opposition to the ruling government? That dilemma is humanitarian intervention (what is done) and the theory of responsibility to protect (why it is done) in a nutshell.¹⁰

I. INTRODUCTION

The concept of humanitarian intervention may be gaining some international recognition despite its opposition to the widely-accepted status quo of nonintervention into matters of State sovereignty.¹¹ U.N. Charter Article 2(4)¹² directs all States to refrain from the use or threat of force against one another for any reason other than self-defense¹³ or actions in accordance with express U.N. authority.¹⁴ What, then, could make some Western politicians advocate force against another country in the wake of a natural disaster?

worldnews/asia/burmamyanmar/1944735/Myanmar-cyclone-Burma-generals-hijack-relief-efforts.html.

⁷ Associated Press, *U.S. Admiral: Myanmar Junta Unconcerned By Cyclone*, CNN.COM, May 15, 2008, <http://www.cnn.com/2008/WORLD/asiapcf/05/13/myanmar.aid/index.html>.

⁸ World Federalist Movement Institute for Global Policy, *The Responsibility to Protect and Its Application to the Situation in Burma*, May 9, 2008, <http://www.globalpolicy.org/component/content/article/154/26069.html>.

⁹ AUSTRALIA NETWORK NEWS, *US Congressmen Call for Humanitarian Intervention in Burma*, May 17, 2008, http://australianetwork.com/news/stories/asiapacific_stories_2247869.htm.

¹⁰ Humanitarian intervention is a wide-ranging doctrine that includes all diplomatic means from negotiations through sanctions, embargoes and, as a last resort, military intervention. Even military intervention has several levels from refusal of training, port blockades and, on the extreme end, aggression. This article deals primarily with this extreme end of humanitarian intervention, which is considered only when all other lesser forms of reasoning and coercion have failed.

¹¹ U.N. GAOR, 25th Sess., Supp. No. 18, at 338, U.N. Doc. A/8082 (Oct. 24, 1970) (General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, proclaiming the “duty not to intervene in matters within the domestic jurisdiction of any state”).

¹² “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.

¹³ U.N. Charter art. 51.

¹⁴ U.N. Charter arts. 39 and 41 (stating self-defense and U.N. Security Council direction are the only bases for use of force against other nations).

Theorizing that all states have a responsibility to protect people suffering massive human rights abuses is controversial. Even more controversial would be using this theory as a justification to use aggression against a state unwilling to accept humanitarian assistance in the event of a natural disaster. Controversial does not mean impossible. Part II of this article explains the general concept of humanitarian intervention and its possible emergence as an international legal norm. Part III discusses the new “kinder, gentler” theory of humanitarian intervention emerging as the responsibility to protect and its application as a basis for intervention. As the concepts are far from established customary international law, Part IV discusses controversies and attractions of the doctrines. Part V addresses how the “responsibility to protect” theory could shape future natural disaster response efforts if States were so inclined to apply its tenets.

II. BACKGROUND

The impact of Cyclone Nargis prompted a request to use the responsibility to protect doctrine as a justification to force a nation to receive humanitarian aid.¹⁵ Although the request was not acted upon, it illustrates the willingness of some people to consider individual human rights as superior to a State’s right to sovereignty in the event of a devastating natural disaster. This illustration provides insight for potential application of the principles concerning current pending natural disasters.

State sovereignty implies responsibility, and primary responsibility for the protection of its people lies with the state itself.¹⁶ States have a responsibility to protect their own citizens from avoidable catastrophic human rights violations such as starvation, mass murder, and systematic rape specifically¹⁷ and from genocide, war crimes, ethnic cleansing, and crimes

¹⁵ World Federalist Movement Institute for Global Policy, *The Responsibility to Protect and Its Application to the Situation in Burma*, May 9, 2008, <http://www.globalpolicy.org/component/content/article/154/26069.html>.

¹⁶ Report of the International Commission on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect Report*, at XI, Dec. 2001 [hereinafter ICISS Report]. (The ICISS Report attempts to lay out the complete theory of responsibility to protect and rules for its implementation as an international legal norm. The ICISS Report was largely adopted whole cloth by the U.N. at the 2005 World Summit; as such it is the basis for the U.N.’s most current policy stance, which accepts the theory in large measure.) See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § SCOPE (1987). Increasingly, international human rights agreements have created obligations and responsibilities for States to respect individuals subject to their jurisdiction, including their own nationals, and customary international law of human rights has developed and has continued to grow. See also *id.* at § 701.

¹⁷ ICISS Report, *supra* note 16, at XI. See also U.N. 2005 World Summit Outcome, GA Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

against humanity more generally.¹⁸ “Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”¹⁹ As the international community looks beyond state sovereignty-centered legalism toward a more heavily individual rights influenced paradigm, this concept may take on greater significance.

Typically, states do not interfere with the internal workings of other sovereign states.²⁰ A sovereign state is empowered in international law to exercise exclusive and total jurisdiction over matters within its territorial borders.²¹ Other states have the corresponding duty not to intervene in the internal affairs of sovereign states.²² If states do intervene, the offended state has the right to defend itself from outside aggressors.²³ Humanitarian intervention and the responsibility to protect theory both seek to elevate the protection of individual human rights above the sanctity of sovereignty where there are gross violations of human rights.²⁴

Although the legality of humanitarian intervention is not well-supported in current international law,²⁵ intervention to protect people from their sovereign in serious situations is an old concept.²⁶

Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by

¹⁸ U.N. 2005 World Summit Outcome, GA Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1.

¹⁹ ICISS Report, *supra* note 16, at XI. *See also* U.N. Secretary-General Kofi Annan, Truman Library speech, 45 I.L.M. 1411 (2006) (urging states to protect human rights at home and abroad, even at the expense of state sovereignty if required).

²⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 206 (1987).

²¹ *Id.* at § SCOPE.

²² ICISS Report, *supra* note 16, at 12. *See* U.N. Charter, art. 2. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § SCOPE.

²³ ICISS Report, *supra* note 16, at 12.

²⁴ *Id.* at 6.

²⁵ Petr Valek, *Is Unilateral Humanitarian Intervention Compatible with the U.N. Charter?*, 26 MICH. J. INT'L L. 1223, 1228 (2005). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 905 (1987) (stating “the use of force against another state, even in response to a violation of international obligation, is generally prohibited by the United Nations Charter”). *See also* U.N. Charter art. 2, para.4.

²⁶ *See* Malvina Halberstam, *The Legality of Humanitarian Intervention*, 3 CARDOZO J. INT'L & COMP. L. 1, 2 (1995) (asserting that references to principles of humanitarian intervention originated as early as 1579).

unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.²⁷

“It is increasingly accepted that a state may take steps to rescue victims . . . in an action strictly limited to that purpose and not likely to involve disproportionate destruction of life or property.”²⁸ While not currently customary law,²⁹ there may be an emerging norm of humanitarian intervention for the narrow purpose of suppression of human rights violations.

The protection of human rights is well-established customary international law. One of the core precepts of the United Nations is, in part, to “. . . achieve international cooperation in solving international problems of . . . humanitarian character and in promoting and encouraging respect for human rights . . .”³⁰ Recent statements by two Secretaries General of the U.N.³¹ and the adoption of the theory of responsibility to protect at the 2005 U.N. World Summit show that respect for human life is critical to the role U.N. Member States play in world affairs. At the 2005 U.N. World Summit, States affirmed the obligation to “protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”³² While focusing primarily on peaceful means, the Summit also supported timely, decisive, collective action should

²⁷ Valek, *supra* note 25, at n.1. (citing Hugo Grotius, *THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS* 288 (A.C. Campbell trans. 1901)).

²⁸ *RESTATEMENT (THIRD) OF FOREIGN RELATIONS* § 703 (1987).

²⁹ Christopher P. DeNicola, *A Shield for the “Knights of Humanity”: The ICC Should Adopt a Humanitarian Necessity Defense to the Crime of Aggression*, 30 U. PA. J. INT’L L. 641, n.60 (2008).

³⁰ U.N. Charter art. 1, para. 3.

³¹ See Press Release, United Nations Secretary General, Secretary-General Addresses International Peace Academy Seminar on the ‘Responsibility to Protect,’ U.N. Doc SG/SM/8125 (Feb. 15, 2002), available at <http://www.un.org/News/Press/docs/2002/sgsm8125.doc.htm>:

I believe it marks an important step in the difficult process of building a new global consensus on intervention for human protection. . . . What is clear is that when the sovereignty of States and the sovereignty of individuals come into conflict, we as an international community need to think hard about how far we will go to defend the former over the latter. Human rights and the evolving nature of humanitarian law will mean little if a principle guarded by States is always allowed to trump the protections of the citizens within them.

(Secretary General Kofi Anan commenting on the launch of the ICISS Report). See also Press Release, United Nations Secretary General, Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event on ‘Responsible Sovereignty: International Cooperation for a Changed World’, U.N. Doc SG/SM/11701 (Jul. 15, 2008), available at <http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm> (Secretary General Ban Ki-moon, stating “[Responsibility to Protect] is not a new code for humanitarian intervention. Rather, it is built on a more positive and affirmative concept of sovereignty as responsibility.”) See also 2005 World Summit Outcome, GA Res. 60/1, para. 138 (Oct. 24, 2005).

³² 2005 World Summit Outcome, GA Res. 60/1, para. 138 (Oct. 24, 2005).

peaceful means prove inadequate to redress human rights violations.³³ The responsibility to react to sudden crises is one of the three key components of the responsibility to protect theory.³⁴ “In extreme and exceptional cases, the responsibility to react may involve the need to resort to military action.”³⁵

Determining whether a situation warrants protection by military intervention is complicated. The doctrine of humanitarian intervention was arguably used to justify military intervention in Kosovo, Somalia and Bosnia³⁶ even without clearly established parameters of use. It would not be a far stretch to apply the doctrine to the current situation in the Darfur region of Sudan. Severe human rights violations were committed either at the direction of their governments, in complicity with their governments or in the absence of effective governance. When force is used to perpetrate these types of violent actions against the populace, using greater force to stop it may be reasonable and necessary if other lesser means of resolution have failed.

III. HUMANITARIAN INTERVENTION: AN EMERGING LEGAL NORM

Interventions undertaken without the approval of the U.N. Security Council are still considered by most international legal scholars to be illegal, even if morally justified.³⁷ One definition of anticipatory humanitarian intervention is “the coercive interference by one state or group of states into the affairs of another state for the express purpose of preempting or mitigating human rights atrocities that are about to be committed in the latter state.”³⁸

³³ *Id.* at 139.

³⁴ ICISS Report, *supra* note 16, at XI. The other two key elements are the responsibility to prevent and the responsibility to rebuild. This article will not focus on these two elements.

³⁵ *Id.* at 31.

³⁶ Christopher C. Joyner and Anthony Clark Arend, *Anticipatory Humanitarian Intervention: An Emerging Legal Norm?*, 10 USAFA J. LEG. STUD. 27, 37–42 (1999/2000) (discussing U.N. responses to human rights crises from non-action to authorization of the use of force to implicit endorsement of regional action absent their initial consent). *But see* T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 27–40 (2002) (for a comprehensive discussion of these and other similar conflicts with some dissent on their categorization as humanitarian intervention).

³⁷ *See* U.N. Charter art. 27, ch. VII-VIII. *See* Joyner & Arend, *supra* note 36, at 33. *See* DeNicola, *supra* note 29, at 653 n.58. *See also* Valek, *supra* note 25, at 1236 (“[n]onetheless, unilateral humanitarian intervention is in conflict with the international customary law principle of non-intervention, the General Assembly’s 1970 Declaration on Friendly Relations, and the 1981 Declaration on the Inadmissibility of Intervention”). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 703.

³⁸ Joyner & Arend, *supra* note 36, at 34. For a definition of humanitarian intervention see Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT’L & COMP. L. REV. 605 n.5 (“[h]umanitarian intervention may be defined as: ‘[T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within

Individual rights, even human rights, are still primarily viewed as subservient to sovereign rights.³⁹ “Whether a state may intervene with military force in the territory of another state without its consent, not to rescue the victims but to prevent or terminate human rights violations, is not agreed or authoritatively determined.”⁴⁰ Even so, an initiative undertaken by a regional body might be legitimate even without U.N. Security Council authority.⁴¹

Since the end of the Cold War, humanitarian intervention has become more common, subordinating national sovereignty claims in favor of basic human rights protections.⁴² Two such examples are the North Atlantic Treaty Organization (NATO) intervention into Kosovo in 1999⁴³ and the Economic Community of West African States (ECOWAS) regional use of force against Sierra Leone in 1997.⁴⁴ In both cases justification hinged at least in part on using multi-lateral regional force to stop massive killings of civilians when the State refused to act or was the violent aggressor. Both proceeded without U.N. Security Council authorization and both were sanctioned post-intervention.⁴⁵

which the sovereign is presumed to act with reason and justice.” (citing Jean- Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203-04, n.3 (1974)).

³⁹ DeNicola, *supra* note 29, at 655 (citing Independent Int’l Comm’n on Kosovo, *The Kosovo Report 167-68* (2000) and arguing Article 1(3) of the Charter merely states that the United Nations seeks to “promote and encourage respect for human rights” and does not state that the organization’s mission is to enforce human rights. U.N. Charter, art. 1, para. 3.).

⁴⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 703.

⁴¹ *Id.* at § 905. See also ICISS Report, *supra* note 16, at XII.

⁴² Dr. Clinton W. Alexander, *NATO’s Intervention in Kosovo: The Legal Case for Violation Yugoslavia’s National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT’L L. 403, 403–405 (2000).

⁴³ *Id.* at 405–406. Between February 1998 and March 1999, ethnic tension and violence in the Kosovo province of Yugoslavia surged dramatically between the majority ethnic Albanian population and the majority Serbian government. Thousands of Albanian civilians were killed or forcibly removed, resulting in the death or forced expulsion of thousands of ethnic Albanian civilians. President Bill Clinton and NATO Secretary General Javier Solana ordered 79 days of NATO airstrikes against Serbian military targets to restore order and prevent Serb forces from inflicting further harm on the Kosovar population.

⁴⁴ Peter A. Jenkins, *The Economic Community of West African States and The Regional Use of Force*, 35 DENV. J. INT’L L. & POL’Y 333, 346–347 (2007). Sierra Leone struggled with a history of authoritative regimes and civil disputes between the Revolutionary United Front (RUF) and the Sierra Leone People’s Party (SLPP) prior to and throughout the 1990’s. The temporary peace of the Abidjan Accord fell apart. In the late 1990’s the Kamajors, a rural militia fighting against the RUF, initiated several attacks which caused a vicious response by the RUF including some of the worst state-sponsored atrocities ever in Sierra Leone. ECOWAS and the Nigerian government’s justifications for the use of force were: the right to self-defense, the appeal by President Kabbah seeking ECOWAS assistance, the atrocities committed by *junta* troops against Sierra Leonean citizens, the threat to international peace and security in the region caused by the flow of Sierra Leonean refugees to neighboring countries, and the prevention of the execution of “atrocities” by the *junta*. The humanitarian intervention was based in part on a belief they had a responsibility to protect the civilians in peril from the government and rebel forces.

⁴⁵ Alexander, *supra* note 42, at 403, 404; and Jenkins, *supra* note 44, at 346.

The U.N. Security Council itself has helped to legitimize humanitarian intervention. It has shown a “willingness to recognize that humanitarian crises may in and of themselves be threats to international peace and security.”⁴⁶ When the U.N. Security Council voted resoundingly against condemning NATO’s Kosovo action, they made what was previously illegal legal.⁴⁷ As there was not a strong international outcry against either NATO’s actions nor the Security Council’s response, States, by their silence after the Kosovo Commission findings were published, may also legitimize humanitarian intervention at least in certain circumstances.⁴⁸

It cannot be said that humanitarian intervention has the immutable strength of customary international law. Still, the concept cannot be dismissed as irrelevant when there are many indicators of its growing acceptance.

IV. CRITICISM OF THE RESPONSIBILITY TO PROTECT THEORY

There are longstanding and pervasive criticisms of the responsibility to protect theory. The use of force to maintain or establish peace appears a contradiction on its face in both end state and nature of action.⁴⁹ Because of the cost in resources, finances, and logistics, it can be argued that the entire concept is a ruse to allow powerful countries to control and subjugate weaker countries during a time of increased vulnerability and reliance. If the responsibility to protect actually implies an obligation to act or a right to be protected, there is also a withering lack of law governing the concept generally or natural disaster response requirements specifically. If the responsibility to protect is actually an obligation or a right, all countries must be treated equally, which introduces issues of equity and resources. Several criticisms are summarized by Louise Arbour, the U.N. High Commissioner for Human Rights.

⁴⁶ Joyner & Arend, *supra* note 36, at 43 (citing U.N. actions in Northern Iraq, Bosnia, Somalia, and Rwanda as direct support to that conclusion).

⁴⁷ See Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 AM. J. INT'L L. 828, 830-31 (1999) (suggesting that the Security Council's twelve to three vote against a resolution condemning NATO's Kosovo action as well as Resolution 1244 provide legitimacy, which translates into legality). See also S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999).

⁴⁸ One of the very last lines of the Independent International Commission on Kosovo: The Kosovo Report (Oct., 2000), available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> [hereinafter The Kosovo Report] makes this clear. “If, therefore, we stand back from the Kosovo intervention, it becomes clear that it did not so much create a precedent for intervention elsewhere as raise vital questions about the legitimacy and practicability of the use of military force to defend human rights and humanitarian values in the 21st century.” *Id.*

⁴⁹ See generally Young Sok Kim, *Responsibility to Protect, Humanitarian Intervention and North Korea*, 5 J. INT'L BUS & L. 74 (2006).

To begin with, the ‘right’ to intervene is by definition discretionary. It is the prerogative of the intervener and has always been exercised as such, thereby creating a hierarchy among those who received protection and those whom the potential intervener could afford to ignore. The invocation of such right has also, not surprisingly, unleashed criticism from the many who question the interveners’ purity of intent and who denounced, plausibly or not, the self-serving agendas that they believed were hidden behind the pretence of humanitarianism.⁵⁰

While these concerns may be valid, they are not insurmountable.

A. Humanitarian Military Intervention as Sophistry

Detractors of humanitarian intervention vilify its use as a smokescreen to justify wars of aggression.⁵¹ Political commentator Noam Chomsky sees military intervention in the name of protecting human rights as absurd.⁵² Shifting focus in international treaties from State-centered orientation to the well-being of individuals⁵³ might lead to an increased temptation to invade more readily in contradiction to the rule supporting nonintervention set out by the United Nations Charter.⁵⁴ Some argue there is not justification for humanitarian intervention, which is basically another name for invasion.⁵⁵

Wars waged by powerful countries are generally expensive, complex and disruptive. While it is true that the history of the world has seen pretextual wars of aggression, this paper is concerned with intervention in response to disastrous fallouts from natural disasters. To make a war strategy that depends first on a random act of nature is unlikely in the extreme.

⁵⁰ Adèle Brown, *Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?*, International Affairs and Defence Section, House of Commons Library, Research Paper 08/55, p. 12 (2008) (quoting Louise Arbour, Speech to Trinity College, Dublin, *The Responsibility to Protect as a Duty of Care in International Law and Practice* (Nov. 23, 2007)).

⁵¹ Kim, *supra* note 49, at 74 (citing FRANCIS A. BOYLE, *DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11TH* 106 (Clarity Press, 2004) (discussing the U.S. retroactive application of humanitarian intervention to justify its invasion in Iraq after no weapons of mass destruction were discovered)).

⁵² Kim, *supra* note 49, at 94 (citing NOAM CHOMSKY, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 48 (South End Press, 2000)).

⁵³ *Id.* (quoting OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 81 (Martinus Nijhoff Publishers, 1991) (“the fact that increasingly treaties in the economic and social fields as well as in the area of the law of war recognized the well-being of individuals as their *raison d’etre* is further evidence that international law is moving away from its State-centered orientation”).

⁵⁴ U.N. Charter art. 2, para. 4; art. 2, para. 7.

⁵⁵ See Benjamin P. Dean, *Self-Determination and U.S. Support of Insurgents: A Policy-Analysis Model*, 122 MIL. L. REV. 149, n.133 (1988).

B. Power Struggles

Some in the international legal field see an ulterior motive of command and control behind the guise of aid promised through humanitarian intervention. “Humanitarian intervention looks like an ingenious juridical technique to encroach little by little upon the independence of a State in order to reduce it progressively to [a] status of semi-sovereignty. . . . [it is] impossible to separate the humanitarian from the political grounds for intervention.”⁵⁶ International law professor Francis A. Boyle states the suspicion even more bluntly. “Humanitarian intervention is a joke and a fraud repeatedly manipulated and abused by a small number of very powerful countries in the North in order to justify wanton military aggression against and prolonged military occupation of weak countries of the South.”⁵⁷

These are not overwhelmingly compelling arguments, especially given the response of Myanmar’s *junta* regime of in the wake of Cyclone Nargis. However, they may explain the obvious distrust a weaker country might show when aid is offered by more powerful countries. Even as death tolls shot over 100,000, the cost of accepting assistance was deemed too high. Clearly this is not an insignificant concern.

Humanitarian assistance in the wake of a natural disaster is not designed with either occupation or subjugation in mind, although it may be difficult to cull political motivation from altruistic pursuits. “There are no apolitical decisions in the field of humanitarian intervention.”⁵⁸ Thought must be given to resources, timing, other commitments and capability. Thus a nation may find itself unable to assist even if it felt obligated to do so. As all government decisions of an international nature are political, the real issue is not the political motivation for the intervention but how the intervention is carried out. That is where law helps create norms, boundaries and expectations. Unfortunately, this area of the law is almost wholly without governing law.

C. Lack of Compelling Law

The lack of law concerning humanitarian intervention and the responsibility to protect makes it difficult to predict behavioral norms with

⁵⁶ Kim, *supra* note 49, at 78 (2006) (citing FRANCIS A. BOYLE, DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11TH 107 (Clarity Press, 2004)).

⁵⁷ *Id.* at 94 (quoting FRANCIS A. BOYLE, DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11TH 106 (Clarity Press, 2004)).

⁵⁸ Tobias Vogel, *The Politics of Humanitarian Intervention*, Sept. 3, 1996, <http://www.jha.ac/articles/a011.htm>.

certainty.⁵⁹ While there is a great deal of interest in the concept, “interest may not rise to the level of legal responsibility.”⁶⁰ Humanitarian intervention as a legal duty or responsibility is a new, even arguably made-up concept that defies the longstanding international noninterventionist policy that is currently embodied in the United Nations Charter.⁶¹

Since there are no international legal instruments that set forth the obligations of states regarding the application of humanitarian intervention to natural disasters, customary international law must provide guidance.⁶² Humanitarian intervention, while lacking a strong historical legal basis, has gained in popularity both among states and regional bodies.⁶³ There are two typical rationales asserted for its use.

[S]pecific violations of human rights are also violations of international treaty agreements which warrant ‘self-help’ by other parties to the agreement, or [alternatively] that circumstances that accompany gross human rights violations, particularly the mass flow of refugees across state borders constitute a threat to the peace which warrants unilateral or collective response in the absence of UN action.⁶⁴

While these rationales are firmly rooted in the U.N. Charter and various international documents, they still do not get to the rather boutique issue of intervention solely for the purpose of responses to natural disasters. It is entirely possible, and quite probable, that refugees displaced by a massive natural disaster will flood the surrounding countries or other areas of safety when they are not taken care of by their own government. This could make any massive refugee displacement threat, regardless of reason, fit into the alternative rationale above. This would not require new laws or theories specific to natural

⁵⁹ Tyra Ruth Saechao, *Natural Disasters and the Responsibility to Protect: From Chaos to Clarity*, 32 BROOK. J. INT’L L. 663, 698 n.184 (2007) (citing Zama Coursen–Neff, *Preventative Measures Pertaining to Unconventional Threats to the Peace Such as Natural and Humanitarian Disasters*, 30 N.Y.U. J. INT’L L. & P. 645, 704 (1998) (noting that “[i]nternational law has progressed to the point where there is recognition of responsibility to disaster victims, but this recognition has not yet become legally binding”)).

⁶⁰ *Id.* at 698.

⁶¹ Olivier Corten, *Humanitarian Intervention: A Controversial Right*, http://www.unesco.org/courier/1999_08/uk/ethique/txt1.htm (last visited Jan. 26, 2009) (“The term ‘right’ or ‘duty’ of ‘intervention’—to which the word ‘humanitarian’ was soon added—was coined in the late 1980s by Mario Bettati, Professor of International Public Law at the University of Paris II, and by the French politician Bernard Kouchner, one of the founders of the aid organization Médecins sans frontières (Doctors without Borders)).

⁶² Saechao, *supra* note 59, at 698.

⁶³ Peter A. Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 35 DENV. J. INT’L L. & POL’Y 333, 339 (2007).

⁶⁴ *Id.* at 339-340.

disasters. Even though threat to the peace might be the basis for intervention, it would be better to have a narrowly defined method of handling the unique issues associated with the responsibility to protect theory and humanitarian intervention.⁶⁵ This is particularly important when the U.N. has either refused to act or its actions have been insufficient to stop large-scale human rights abuses in the wake of a fast-moving natural disaster.

D. Responsibility, Right or Duty

Responsibility to protect might be used to justify humanitarian intervention for disaster relief when treatment of nationals “shocks the conscience of mankind.”⁶⁶ One writer proposes that all states have a responsibility to give and receive aid when natural disaster strikes, including a duty to warn, provide aid and ensure sustainable reconstruction and rehabilitation of the disaster-affected area.⁶⁷ This proposal does not have widespread support in the international legal community. Especially progressive proponents believe the responsibility to protect has “. . . evolved from a right to a duty, which is morally required even in the absence of Security Council approval.”⁶⁸ The implications of a transition from a right to a duty “are far-reaching, and key questions, such as to whom the duty would attach, remain unresolved.”⁶⁹

There is little written law concerning humanitarian intervention and none whatsoever requiring intervention in the face of a natural disaster.⁷⁰ Nor is there much depth of customary international law on point. As such, until customary law changes through state practice or specific treaties are widely ratified, it is difficult to argue the mere term “responsibility” is synonymous with duty or obligation.

⁶⁵ Indeed the Commission on Kosovo stressed the need for a body of rules to cover humanitarian intervention specifically. “The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention.” The Kosovo Report, *supra* note 48.

⁶⁶ Saechao, *supra* note 59, at 672. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (“a violation is gross if it is particularly shocking because of the importance of the right or the gravity of the violation”).

⁶⁷ Saechao, *supra* note 59, at 678.

⁶⁸ Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”? Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 399 (2005).

⁶⁹ *Id.*

⁷⁰ See *infra* Section IV.C.

Despite the problems with implementing humanitarian intervention and the theory of responsibility to protect, it can still be a viable option if properly managed.⁷¹

V. CRAFTING NATURAL DISASTER HUMANITARIAN INTERVENTION DOCTRINE

A. A Call for Responsibility to Protect Theory as Grounds for Humanitarian Intervention

“Proponents of the right to intervene have also claimed that states have a broad ‘responsibility to protect’ citizens of other states from mass murder, rape, and starvation when their own states refuse to do so.”⁷² States also must protect citizens from crimes against humanity, which includes “the intentional denial of humanitarian assistance” during armed conflict.⁷³ In the absence of state action, either through disinclination or capability, it becomes the duty of other states to extend that protection and no longer hide behind draconian notions of state sovereignty in these areas of protection.⁷⁴

Just as the unsanctioned intervention in Kosovo was not considered strictly “legal” prior to the deployment of forces, military intervention in response to natural disasters has weak legal grounds as well. The U.N. eventually sanctioned NATO’s intervention, at least in part, because most believed that, given the circumstances, it was the right thing to do.⁷⁵ This intervention could be described as illegal but legitimate.⁷⁶ The same post-action

⁷¹ The Kosovo Report, *supra* note 48 (detailing the need for clarity and guidance in implementing humanitarian intervention policies while supporting its existence).

⁷² DeNicola, *supra* note 29, at 658–59 (referencing Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT’L L. 99, 99 (2007); ICISS Report, *supra* note 16, at VIII. See also S.C. Res. 1674, ¶4, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity during times of conflict).

⁷³ S.C. Res. 1674, ¶5, U.N. Doc. S/RES/1674; ICISS Report, *supra* note 16, at XI.

⁷⁴ Kofi Annan, United Nations Secretary-General, Truman Library speech, 45 I.L.M. 1411 (Dec. 11, 2006):

[T]his responsibility is not simply a matter of states being ready to come to each other’s aid when attacked—important though that is. It also includes our shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity— a responsibility solemnly accepted by all nations at last year’s U.N. summit. That means that respect for national sovereignty can no longer be used as a shield by governments intent on massacring their own people, or as an excuse for the rest of us to do nothing when such heinous crimes are committed.

⁷⁵ The Kosovo Report, *supra* note 48, at Conflict, International Response, Lessons Learned 4.

⁷⁶ Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of U.N. Reform*, 99 A.J.I.L. 619, 626 (2005) (“Issues of legality versus legitimacy have roiled the international law

sanction could apply in the wake of intervention after a natural disaster where the actions of the responsible government are heinous enough to exacerbate the death toll to a level that shocks the conscience. In order to have the best chance of at least retroactive sanctions, any action must be carefully crafted around accepted principles of the responsibility to protect doctrine.

B. Natural Disasters Current State of Affairs

It is unlikely that Cyclone Nargis will be the last natural disaster of such disastrous magnitude in the world. A natural disaster may be defined as “the consequences of events triggered by natural hazards that overwhelm local response capacity and seriously affect the social and economic development of a region.”⁷⁷ In 2008, 235,816 people were killed or missing as a result of natural disasters and nearly 212 million more were otherwise affected by them.⁷⁸ The rate of dead or missing people is nearly four times that of the average death toll due to natural disasters between 2000 and 2007.⁷⁹ In Tajikistan and Djibouti, 41,543 and 40,817 people per 100,000 inhabitants respectively were impacted by natural disasters in 2008.⁸⁰ There has been a staggering increase in reported occurrences of country-level natural disasters since 1975, from a low of just over 50 in 1975 to a high of nearly 450 in 2005.⁸¹ The actual number of natural disasters in 2008 is slightly below the average since the turn of the century,⁸² but the cost in lives is substantially greater.

The use of force against a sovereign state solely to avert suffering caused by a natural disaster may be argued as justifiable under the responsibility to protect theory. The United Nations has declared that “[t]he sovereignty, territorial integrity and national unity of States must be fully respected . . . [and] . . . humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.”⁸³ As the situation in Myanmar clearly demonstrated, countries do not always want outside aid and, at least once, would rather bury 140,000 people than accept

community ever since the Kosovo commission declared that the NATO intervention in Kosovo was “illegal but legitimate.” (citing The Kosovo Report, *supra* note 48).

⁷⁷ Elizabeth Ferris, Senior Fellow, Foreign Policy, Brookings Institute, Workshop on the Role of African National Human Rights Institutions in Protecting the Human Rights of IDPs, speech, *Natural Disasters, Human Rights, and the Role of National Human Rights Institutions* (Oct. 25, 2008) available at www.brookings.edu/speeches/2008/1025_natural_disasters_ferris.aspx?p=1.

⁷⁸ U.N. International Strategy for Disaster Reduction Fact Sheet, 2008 Disasters in Numbers, currently available at <http://www.continuitycentral.com/2008disasters.pdf> (last visited Oct. 11, 2009).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ G.A. Res. 46/182, Annex ¶ 3, U.N. Doc. A/Res 46/182 (Dec. 19, 1991).

outside assistance. During the Bosnia and Herzegovina crisis of the early 1990's, the U.N. Security Council authorized "all measures necessary" to ensure safe delivery of humanitarian assistance and protection of humanitarian aid workers.⁸⁴ The U.N. Security Council has already strongly condemned the intentional denial of humanitarian assistance during armed conflict.⁸⁵ The Security Council may fail to act in a timely and effective manner in the face of another devastating natural disaster just as it did in the wake of Cyclone Nargis. It is possible another regional body may take it upon itself to intervene the next time the Security Council fails to respond decisively. Force has not yet been used solely to avert the adverse impact on human rights caused by a natural disaster, but it could be possible.

C. Africa Snapshot

From drought and famine to food prices and demagogues, many parts of the African continent are ripe for other natural catastrophes to reach unimaginable and unnecessary devastation.⁸⁶ There is a global food crisis that has a disproportionate impact on developing countries, including many African nations.⁸⁷ Some estimates place 14 million people at risk in the "hidden famine" in the Horn of Africa.⁸⁸ This one natural disaster alone could lead to disastrous regional instability and staggering death tolls that might re-engage the responsibility to protect debate in the international community.

There is little practical difference to citizen observers on the ground between a country actively killing 100,000 of its citizens to remove them from a coveted portion of land⁸⁹ and letting 100,000 of its citizens die by refusing readily available food, water, shelter or medical aid to a certain segment of the population impacted by a natural disaster.⁹⁰ The resultant death toll is a direct consequence of government-implemented action or inaction aimed at achieving

⁸⁴ S.C. Res. 770, ¶ 2, U.N. Doc. S/RES/770 (Aug. 13, 1992).

⁸⁵ S.C. Res. 1674, ¶ 5, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

⁸⁶ In 2008, Asia was by far the region hardest hit by natural disasters with nine of the ten countries with the highest natural disaster related death tolls located in Asia. Press Release, U.N. International Strategy for Disaster Reduction, CRED Disaster Figures, Deaths and Economic Losses Jump in 2008, UNISDR 2009/1 (Jan. 22, 2009), available at <http://www.unisdr.org/eng/media-room/press-release/2009/pr-2009-01-disaster-figures-2008.pdf>. This article focuses on Africa because of the resemblance between Zimbabwe President Robert Mugabe's approach to humanitarian assistance and that of the *junta* regime of Myanmar.

⁸⁷ See generally USAID FEWSNET, <http://www.fews.net> (last visited Sept. 11, 2009).

⁸⁸ Steve Bloomfield, *Hidden Famine in Horn of Africa*, INDEPENDENT, Jul. 23, 2008 available at <http://www.independent.co.uk/news/world/africa/hidden-famine-in-horn-of-africa-puts-14m-at-risk-874873.html>.

⁸⁹ Such as many argue is happening in Darfur, Sudan.

⁹⁰ As has been described in Myanmar after Cyclone Nargis.

an otherwise avoidable result. This is a violation of human rights at a most basic level.

D. Pending Disasters in Africa Likely to be Exacerbated by State Policies

The *junta* regime in Myanmar is unlikely to be the last regime to attempt to impede or hijack humanitarian assistance from disaster-impacted people. In some parts of Africa, the impacts of drought, famine and soaring food prices have been exacerbated by using starvation or access to food as a political tactic. The continued drought and ensuing famine poised to spread throughout Ethiopia are well documented.⁹¹ In the wake of a highly politicized and criticized national election, the President of Zimbabwe, Mr. Robert Mugabe, was accused of impeding aid, aid workers, and food from reaching those civilians who do not support his goal to stay in office.⁹² It is claimed that food and aid were refused delivery despite being the only food available for many civilians in a starving community.⁹³ So far, the U.N. has not acted effectively to halt this situation.⁹⁴ In Sudan, there are reports of the country growing food to sell and shipping it outside the country to take advantage of the soaring price of food.⁹⁵ Internal conflict or allegations of genocide aside, while the government profits from the world food shortage, ethnic black Africans in the Darfur region of South Sudan are literally left to waste away from lack of sustenance available in other parts of the nation.⁹⁶

Any of these situations, already dangerously unstable, could topple in the face of a natural disaster such as plague or continued drought, earthquake, or other similar, unpredictable force of nature. This could destabilize the entire region surrounding the catastrophe. Should the international community find

⁹¹ USAID, Famine Early Systems Warning Network, <http://www.fews.net/pages/country.aspx?gb=et&l=en> (last visited Nov. 14, 2008).

⁹² Human Rights Watch, All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming General Elections, <http://www.hrw.org/en/reports/2008/03/18/all-over-again> (last visited Mar. 18, 2008). See also Celia W. Dugger, *In a Crackdown, Zimbabwe Curbs Aid Groups*, N.Y. TIMES, Jun. 4, 2008, available at <http://www.nytimes.com/2008/06/04/world/africa/04zimbabwe.html?n=Top/Reference/Times%20Topics/Organizations/C/CARE>; Elisabetta Povoledo and Alan Cowell, *Officials Criticize Mugabe's Presence at a U.N. Conference in Rome*, N.Y. TIMES, Jun. 3, 2008, available at <http://www.nytimes.com/2008/06/03/world/africa/03zimbabwe.html?fta=y>.

⁹³ Human Rights Watch, All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe's Coming General Elections, <http://www.hrw.org/en/reports/2008/03/18/all-over-again> (last visited Mar. 18, 2008).

⁹⁴ Press Release, Security Council, Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes, SC/9396 (Jul. 11, 2008).

⁹⁵ Jeffery Gettleman, *Darfur Withers as Sudan Sells Food*, N.Y. TIMES, Aug. 10, 2008, available at <http://www.nytimes.com/2008/08/10/world/africa/10sudan.html>.

⁹⁶ *Id.*

itself with a natural disaster and response equivalent to Cyclone Nargis in Myanmar, it could craft a humanitarian intervention solution utilizing the principles of responsibility to protect.

VI. NATURAL DISASTER RELIEF UNDER THE RESPONSIBILITY TO PROTECT THEORY

Criticism of the responsibility to protect doctrine and its vulnerability to misuse make it essential to weave as many protections into its application as possible while leaving it viable for impactful implementation. As suggested by ICISS, six criteria must be met in order to use military force under the responsibility to protect doctrine: just cause, right intention, last resort, proportional means, reasonable prospects, and right authority.⁹⁷ Just cause and right authority act as end caps to best assure the widest acceptance of the anomaly of intervention. Just cause sufficient to warrant use of force can be established if there is a “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation.”⁹⁸ The right authority to authorize military intervention is a sliding scale from the U.N. Security Council as the primary authority,⁹⁹ two-thirds majority vote of the U.N. General Assembly as the first alternative,¹⁰⁰ and localized regional bodies acting in concert when the U.N. fails to sanction intervention.¹⁰¹

Given the international norm of nonintervention,¹⁰² the other four precautionary principles create additional safeguards to rogue violations of sovereignty. Military intervention must be for the right intention. “The primary purpose of the intervention must be to halt or avert human suffering.”¹⁰³ While

⁹⁷ ICISS Report, *supra* note 16, at 31–37. See also S.C. Res. 1674, ¶ 21, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (stressing the need to uphold the “humanitarian principles of humanity, neutrality, impartiality and independence”). See also U.N. 2005 World Summit Outcome, G.A. Res. 60/1, para. 138 (Oct. 24, 2005) (stressing the related humanitarian concepts of protection through appropriate and necessary means); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 905 ;The Kosovo Report, *supra* note 48, 46–47 (2000) (listing five possible criteria for humanitarian intervention as serious violations of human rights or international humanitarian law, a failure by the UNSC to act, multilateral bases for the action undertaken, only necessary and proportionate force used, and “disinterestedness” of the intervening states).

⁹⁸ ICISS Report, *supra* note 16, at 31. It can also be met if there exists “large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.” *Id.*

⁹⁹ *Id.* at 48.

¹⁰⁰ *Id.* at 53.

¹⁰¹ *Id.*

¹⁰² U.N. Charter art. 2, para 4; art. 2, para 7.

¹⁰³ ICISS Report, *supra* note 16, at 35. Other motives may also have merit but cannot be the basis or primary goal of military intervention.

complete altruism or disinterest might be ideal, it is not a political reality.¹⁰⁴ Establishing the “primary purpose” is the best safeguard against subterfuge invasions. Military intervention must be a matter of last resort, justifiable only when “[e]very diplomatic and non-military avenue for the prevention of or peaceful resolution of the humanitarian crisis has been explored”¹⁰⁵ and has either failed or there is no reasonable belief that it would have succeeded.¹⁰⁶ The intervention itself should be strategized as the minimum necessary to secure the human protection objective.¹⁰⁷ Lastly, there must be a reasonable prospect of success to undertake military intervention.¹⁰⁸ Sometimes the cost of an otherwise legitimate intervention may be too high or actual protection is not possible.¹⁰⁹ If any of these safeguards cannot be reasonably insured, military intervention should not be sanctioned.

Application of these six core principles to a natural disaster response must take into account the speed with which natural disaster can take place, the need for a quick and decisive response, and the impact of the affected states’ resistance to receiving humanitarian assistance. Anytime a state is impacted by a disaster, it is reasonable to assume that military intervention may cause further destabilization. If the impacted state is a powerful state, that additional destabilization is almost guaranteed. Since the intervention must cease when the immediate threat has passed, there is a risk of the affected state growing dependent on the aid or interventionists over-stepping their mandated bounds. If a state or regional organization does not commit enough workers and military forces, it may just exacerbate the problem.

Despite its potential limitations, humanitarian intervention based on the corollary responsibility to protect theory could work as a structured response to a massive natural disaster calamity. Applying the six principles can give a reasoned, dispassionate guideline to those states that feel compelled to respond when the U.N. Security Council next fails to provide effective alternatives.

VII. CONCLUSION

The responsibility to protect theory, with its core value of human rights protection, over the sovereign right of noninterference, is an emerging norm in international law discourse. It is not yet law, but, even as a fledgling theory, its framework can be useful in a new frontier—intervention to assist victims of

¹⁰⁴ *Id.* at 36.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 37.

¹⁰⁸ ICISS Report, *supra* note 16, at 35.

¹⁰⁹ *Id.*

natural disasters when their own governments fail to act through neglect or design. Certainly it is not without its detractors and difficulties. Because a thing is difficult, however, does not mean it might not be undertaken in extreme or dire circumstances.

It is clear that the international community cannot reconcile itself to watching the dead pile up like so much waste in the wake of a cyclone, tsunami, or earthquake. Normally any country thus affected will reach out for assistance from those organizations with natural disaster response experience. This article focused on the very rare situation when the unavoidable damage is horrendous and the affected government's response, or failure to respond, is staggeringly devastating. Worse still are regimes that accept limited aid then distribute it in a way calculated to kill off their political opponents, or hijack such relief and sell it to the highest bidder in the international market while its citizens continue to suffer. Cutting off aid through embargoes or other methods helps no one, and continuing to funnel it through a regime that would use it to hurt its citizens perpetuates the catastrophe. The responsibility to protect, particularly under the threat or use of force in response to natural disasters as a last resort, could be a viable option. A time may yet come when it is the best option.

YOU DON'T HAVE TO GO HOME BUT YOU CAN'T STAY HERE: RECENT ENVIRONMENTAL VIOLATIONS LEAD TO WEARING OUT OUR WELCOME IN JAPAN

By Adam G. Province*

“Therefore, take me and bind me to the crosspiece half way up the mast; bind me as I stand upright, with a bond so fast that I cannot possibly break away, and lash the rope’s ends to the mast itself. If I beg and pray you to set me free, then bind me more tightly still.”

– Homer, *The Odyssey* (tr. Samuel Butler)

I. INTRODUCTION

The United States military has a growing problem at its installations in Japan: the presence of nuclear warships is increasingly unpopular with Japanese citizens. Recently, Japan has become sensitive to all issues nuclear.¹ In the past, this sensitivity was not a problem for the United States Navy because the majority of its fleet was not nuclear-powered.² However, as technology became more sophisticated,³ the Navy decided to permanently station nuclear ships in Japan, as well as decommission all non-nuclear aircraft carriers. The outcome

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¹ See, e.g., David E. Sanger, *Nuclear Material Dumped Off Japan*, N.Y. TIMES, Oct. 19, 1993, at A1 (reporting a diplomatic controversy after Russian naval ships dumped hundred of tons of nuclear waste into the Sea of Japan).

² It was not until 1947 when Admiral Chester W. Nimitz approved the development of the first nuclear submarine program while the Manhattan Project was underway in Oak Ridge, TN. See THOMAS B. ALLEN & NORMAN POLMAR, RICKOVER: FATHER OF THE NUCLEAR NAVY xiii–xv (2007) (citing Adm. Hyman George Rickover as the father of America’s nuclear navy).

³ The U.S. Navy produced its first nuclear aircraft carrier in 1960 with the commissioning of U.S.S. Enterprise (CVN 65). See JOSEPH A. ANGELO, JR., NUCLEAR TECHNOLOGY 370 (2004) (discussing the history of naval nuclear-powered vessels).

has produced heated debate over the presence of American forces in Japan; concern about environmental polluting is at the core of this controversy.⁴

The Navy plays an integral role in supporting ground troops, in addition to preserving military readiness and stability at all times across the globe.⁵ The Navy is backed by billions of federal dollars from Congress to maintain a fleet of destroyers, frigates, aircraft carriers, and submarines.⁶ However, while these ships carry out an important role in national security, they have the ability to be environmental floating hazards⁷ while “commanding in the commons.”⁸

Two recent events in Japan sparked the debate about the presence of American nuclear ships: the first when a fire broke out onboard U.S.S. George Washington while en route to Yokosuka, Japan; and the second by U.S.S. Houston when it leaked radioactive material while traveling to ports of call. Environmental mishaps such as these affect international relations with host nations and consequently have the potential of altering regional stability in Asia.⁹

When environmental hazards occur, the United States military has an opportunity to work with local community leaders and host nation governments to build on improving environmental practices. Taking this opportunity would not only benefit local communities, but also improve foreign relations. The end result would allow American military installations to remain open in the host

⁴ See *Criteria for releasing info on accidents must be set*, THE DAILY YOMIURI, Sept. 30, 2008, at 4 (discussing the Japanese government’s concern about the recent arrival of U.S.S. George Washington and events on U.S.S. Houston and calling for better preparedness in the event of a radiation leak).

⁵ See generally Under Sec’y of Def. (Personnel and Readiness), U.S. Dept. of Def., Report to the Congress, *Implementation of the Department of Defense Training Range Comprehensive Plan: Ensuring Training Ranges Support Training Requirements* (2004) available at http://www.dod.gov/prhome/docs/rpt_congress.pdf.

⁶ See, e.g., U.S. Dep’t of Navy, Fiscal Year (FY) 2008/2009 Budget Estimates, Justification of Estimates (February 2007), Operation and Maintenance, Navy, at 2, available at http://www.finance.hq.navy.mil/FMB/08PRES/OPS/OMN_BOOK_Vol1.pdf (requesting \$29,751,721,000.00 for 2008 by the Department of the Navy).

⁷ See generally STEVEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT 4–5 (1996) (explaining that military operations affect the environment in a variety of ways, such as discharging “wastes into lakes and streams, groundwaters, the ocean, and the air”).

⁸ See Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today, and Tomorrow*, 52 NAVAL L. REV. 60, n.160 (2005) (discussing the recent use of the term “command of the commons” referring to the Pentagon’s concept of the U.S. operating the Navy throughout the global commons).

⁹ See, e.g., M. Victoria Bayoneto, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L.J. 111, 116–22 (1994) (discussing a fallout of international relations with the Philippine government leading to the withdrawal of U.S. military forces without any environmental assessment or clean-up).

nation, and thus strengthen regional stability for national security.¹⁰ The Department of Defense (DoD) should embrace environmental regulations as a tool to improve relations with the host nation rather than view environmental issues as a restraint. The idea of the “global commons” should come to the forefront of the American military in protecting the environment.¹¹ Accordingly, the DoD should consider binding itself to environmental provisions with the Japanese government to guarantee accountability for its environmental impact.

The purpose of this article is to discuss and explore how environmental violations have the potential to seriously strain international relations. This article will review significant historical treaties, consider current environmental authority for overseas military installations, and discuss prior environmental incidents abroad as case studies. This article concludes by making specific recommendations that would improve both international relations and environmental standards in Japan.

II. BACKGROUND ON U.S.S. HOUSTON AND U.S.S. GEORGE WASHINGTON

On May 22, 2008, U.S.S. George Washington,¹² a nuclear-powered aircraft carrier, experienced a fire while en route to Yokosuka, Japan¹³ to replace the aging U.S.S. Kitty Hawk.¹⁴ After disembarking from Norfolk, Virginia, 90

¹⁰ See Kristen D. Wheeler, Note, *Homeland Security and Environmental Regulations: Balancing Long-Term Environmental Goals with Immediate Security Needs*, 45 WASHBURN L.J. 437, 465 (2006) (concluding that compliance with environmental regulations can improve national security).

¹¹ See Defense Secretary Dick Cheney, Address to Defense and Environmental Initiative Forum, Washington, D.C. (Sept. 3, 1990) (stating that “defense and the environment is not an either/or proposition. To choose between them is impossible in this real world of serious defense threats and genuine environmental concerns.”).

¹² George Washington did not receive instant approval by the Japanese government. However, after significant lobbying, the mayor of Yokosuka approved the stationing of the nuclear vessel in Japan. See STATE DEPARTMENT DOCUMENTS, *U.S. Welcomes Japanese Mayor's Acceptance of Nuclear-Powered Ship*, 2006 WLNR 10424926.

¹³ The naval base at Yokosuka is located near Tokyo. Because of the historical context of Nagasaki and Hiroshima, nuclear issues gain significant attention because of the close proximity to a major Japanese city. See, e.g., Eric Talmadge, *Japanese jittery about U.S. nuclear vessels; Sub radiation leaks, carrier fire raise worries; Incidents undermine claims of safety, critics say*, SEATTLE TIMES, Feb. 15, 2009, at A13 (discussing tension between local officials over the recent arrival of U.S.S. George Washington).

¹⁴ U.S.S. George Washington is a nuclear-powered aircraft carrier, as distinguished from U.S.S. Kitty Hawk, which was, prior to decommissioning, the last diesel-powered aircraft carrier in the U.S. fleet. See Eric Talmadge, *Japan gives U.S. ship mixed reception; A recently deployed carrier's nuclear reactors touch a nerve*, L.A. TIMES, Feb. 22, 2009, at 4 (reporting that U.S.S. Kitty Hawk was replaced by the nuclear-powered U.S.S. George Washington in Yokosuka, Japan).

gallons of improperly stored refrigerant compressor oil ignited.¹⁵ The exact cause of the ignition is unclear; however, it is believed a crew member accidentally lit the oil while smoking.¹⁶ The fire lasted twelve hours, seriously injuring one sailor and causing minor burns to thirty-seven others.¹⁷

George Washington stopped in San Diego for repairs, and its deployment to Japan was delayed several weeks.¹⁸ After a thorough review of the incident, the Navy determined that the total damage done to the ship, including labor and materials, cost an estimated \$70 million.¹⁹

On July 30, 2008, Captain David C. Dykhoff, the commanding officer of U.S.S. George Washington, was promptly dismissed because of his failure to meet mission requirements and readiness standards.²⁰ Captain David M. Dober, the executive officer, was also relieved of duty due to “substandard performance.”²¹

Soon thereafter, in August 2008, the Navy announced that U.S.S. Houston, a nuclear-powered submarine, leaked radioactive material en route to Hawaii,²² Guam, and Japan.²³ The Navy did not disclose how the leak occurred, but estimated that the problem began in June 2006 while the ship was actively deployed in Pacific ports.²⁴ The incident arose when the cover of a valve

¹⁵ See COMMANDER NAVAL AIR FORCES PUBLIC AFFAIRS, *USS George Washington Investigation Complete, Senior Leadership Relieved*, July 30, 2008 (describing the fire that occurred onboard U.S.S. George Washington while en route to Yokosuka, Japan), http://www.navy.mil/search/display.asp?story_id=38840.

¹⁶ REUTERS, *U.S. fires captain of Japan-bound nuclear warship*, July 31, 2008, <http://www.reuters.com/articlePrint?articleId=UST11078420080731>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See COMMANDER NAVAL AIR FORCES PUBLIC AFFAIRS, *supra* note 17.

²⁰ See Abstracts, *2 Officers Relieved of Duty After Fire on Aircraft Carrier*, N.Y. TIMES, July 31, 2008, at A18 (noting that the commanding officer and executive officer were relieved following the incident).

²¹ Dale Eisman, *Two top Navy officers fired over \$70 million carrier blaze*, VIRGINIA-PILOT, July 30, 2008 available at <http://hamptonroads.com/node/474648>.

²² There are potential environmental claims that the state of Hawaii could bring against the Department of Defense. See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9607(a)(4)(A) (West 1996) (providing a remedy for states to recover compensation for clean-up costs as a result of hazardous federal actions); see also *N.Y. v. U.S.*, 620 F.Supp. 374, 385-86 (E.D.N.Y. 1985) (finding that New York raised a genuine issue of fact in order to proceed on its CERCLA claim). However, the nuclear leak in this case was so minimal that any further discussion would be purely hypothetical, and, thus, these arguments are not addressed in this article.

²³ See Norimitsu Onishi, *U.S. Sub May Have Leaked Radiation While in Japan*, N.Y. TIMES, Aug. 3, 2008, at A12 (reporting that U.S.S. Houston may have leaked radiation while docked in Japan).

²⁴ See Jun Hongo, *Sub's Radioactive Leak Not Harmful, U.S. says*, JAPAN TIMES, Aug. 30, 2008, at A5 (reporting the damage was found on July 17, 2008, while in dry dock in Pearl Harbor).

popped off the submarine's hardware and poured potentially radioactive water onto a sailor.²⁵ The event occurred while Houston was being repaired. It was later determined that the water slowly leaked from the submarine's nuclear power plant.²⁶ However, the water had not been in direct contact with the nuclear reactor; thus, no major damage occurred to Houston.²⁷

The Navy subsequently reported the incident to the governments of Japan, Malaysia, and Singapore.²⁸ Following the incident, the sailor was treated and tested negative for radiation exposure.²⁹ In response to these two incidents, Japanese citizens protested the arrival of U.S.S. George Washington when it docked at its new home in Yokosuka, Japan.³⁰

III. HISTORICAL OVERVIEW

Japan serves as a strategic location that allows the United States to handle regional issues in Asia as they arise. With the economic and military rise of China and the continuing conflict with North Korea,³¹ the importance of Japan is obvious for continued stability in the region.³² Moreover, Japan serves as a major trading partner with the United States for annual gross domestic product.³³ However, naval mishaps, such as those occurring on U.S.S. Houston

²⁵ Mike Mount, *Navy says sub leaked radiation since 2006*, CNN.COM, Aug. 7, 2008, <http://www.cnn.com/2008/US/08/07/navy.sub/index.html>.

²⁶ *Id.*

²⁷ See Jamie McIntyre & Mike Mount, *U.S. sub leaked radioactive water, possibly for months*, CNN.COM, Aug. 1, 2008, <http://www.cnn.com/2008/US/08/01/navy.sub.leak/> (reporting that "the amount leaked while the sub was in port in Guam, Japan and Hawaii was less than a half of a microcurie (0.000005 curies), or less than what is found in a 50-pound bag of lawn and garden fertilizer"); see also *Navy says sub leaked radiation since 2006*, *supra* note 25 (estimating that "the radioactivity from the leaks in all foreign ports added up to less than that found in a smoke detector").

²⁸ See McIntyre & Mount, *supra* note 27. See also Chee Hean, *No Radiation Worries*, STRAITS TIMES, Aug. 26, 2008 (reporting that the radiation leak was not harmful to local citizens).

²⁹ Hean, *supra* note 28.

³⁰ *Id.* (stating that "thousands of Japanese protested the pending arrival of the George Washington"). Eric Talmadge, *Japanese Protest Arrival of U.S. Nuclear Carrier*, SEATTLE TIMES, Sept. 25, 2008, at A9 (noting demonstrators protested on the day George Washington arrived in Japan). Associated Press, *Japan Bombs May Have Targeted U.S. Base*, CHICAGO TRIBUNE, Sept. 14, 2008, at 31 (reporting two explosions near Yokosuka Naval Base may be linked to the unpopular recent arrival of U.S.S. George Washington).

³¹ See Norimitsu Onishi, *Bomb by Bomb, Japan Sheds Military Restraints*, N.Y. TIMES, July 23, 2007, at A1 (discussing the recent transformation of the Japanese military in order to address the threat of North Korea and the rise of China's military).

³² See generally THE HANDBOOK OF THE LAW OF VISITING FORCES 371 (Dieter Fleck ed., Oxford Univ. Press 2001) [hereinafter HANDBOOK OF VISITING FORCES] (providing a historical overview of Japan's importance during the Korean War).

³³ See, e.g., U.S. DEP'T OF COMMERCE, U.S. Bureau of Economic Analysis NEWS, *U.S. International Trade in Goods and Services April 2008*, Jun. 10, 2008, at 20,

and U.S.S. George Washington, have tested the relationship between these two nations.³⁴ A review of relevant international treaties is appropriate in order to comprehend how environmental issues are addressed in Japan.

A. Post-World War II Events

Following World War II, the primary objectives for the United States were to demilitarize Japan and institute democracy. During this period, United States forces were seen as occupiers.³⁵ The formation of a new constitution followed soon thereafter in an effort to prevent any future military aggression from Japan.³⁶

As part of demilitarization, the United States agreed to defend Japan in the event of a military attack.³⁷ The United States has remained in Japan to protect it from potential aggression.³⁸ Moreover, the American military has helped provide for domestic stability in the absence of the Imperial Japanese government.³⁹

The rise of the Korean War in 1950 would soon place more importance on American installations in Japan. A year later, the Peace Treaty with Japan formally ended its occupation by Allied Forces.⁴⁰ That same day, Japan entered into a security agreement granting the United States “use by its land, air and naval forces of facilities and areas”⁴¹ The relationship with Japan soon evolved to allow it greater independence in order to provide for regional stability.

<http://www.census.gov/foreign-trade/Press-Release/2008pr/04/ft900.pdf> (Japan imported from the U.S. \$48,663,000,000 worth of goods and services for the year 2007).

³⁴ This is not the first time a U.S. naval vessel tested positive for a radiation leak. See Steve Herman, *U.S. Navy Says No Danger From Submarine Radiation in Japan*, (Sep. 28, 2006), <http://www.globalsecurity.org/military/library/news/2006/09/mil-060928-voa06.htm> (reporting the first radiation leak since 1964 by U.S.S. Honolulu).

³⁵ See HANDBOOK OF VISITING FORCES, *supra* note 32, at 366 (discussing the evolution of the role of the U.S. in Japan from occupier, then to teacher, and finally to ally and partner).

³⁶ See *id.* at 370–71 (discussing Japan’s future security as one of the main goals in drafting its constitution).

³⁷ *Id.* at 372 (noting that U.S. forces maintained national security, while also providing security for Japan).

³⁸ *Id.*

³⁹ *Id.* at 369.

⁴⁰ Treaty of Peace with Japan, U.S.-Japan, art. 6, Sept. 8, 1951, 3 U.S.T. 3169.

⁴¹ Security Treaty Between the United States of America and Japan, Sept. 8, 1951, 3 U.S.T. 3329.

B. The 1960 Status of Forces Agreement with Japan

The Japan-Status of Forces Agreement (Japan-SOFA)⁴² acts as a contract for a host nation to document an understanding of a visiting military force in Japan.⁴³ A Status of Forces Agreement (SOFA) establishes a meeting of the minds between two nations while a visiting force is stationed in a host nation.⁴⁴ These agreements are not uniform, which allows the parties to include provisions that are more relevant to one nation than other provisions.⁴⁵ It is helpful to think of a host nation as a type of informal landlord with the SOFA acting as the lease agreement, thus the United States would be viewed as the lessee.⁴⁶

Signed in 1960, the Japan-SOFA replaced the original 1951 NATO-SOFA⁴⁷ and established an understanding between the two countries on a broad range of issues.⁴⁸ Most foreseeable issues were addressed at the time the SOFA was accepted.⁴⁹ In order to adapt to new issues, the Japan-SOFA has been amended four separate times.⁵⁰ The overall approach is to provide a flexible

⁴² Agreement Under Art. VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter Japan-SOFA].

⁴³ See Timothy D. Stone, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 230 (2006) (stating that a SOFA agreement provides legal positions and includes the day-to-day operations for visiting forces).

⁴⁴ See generally HANDBOOK OF VISITING FORCES, *supra* note 32, at 365–416 (discussing background information on the function of the Japan-SOFA).

⁴⁵ See R. Chuck Mason, Congressional Research Service Report for Congress, *Status of Forces Agreement (SOFA): What it is, and How Might One be Used in Iraq?* (June 16, 2008) available at http://assets.opencrs.com/rpts/RL34531_20080616.pdf (discussing the Department of Defense and Department of State working together to recognize the needs of the U.S. before negotiating the SOFA agreement).

⁴⁶ See Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 74 (1996) (comparing a host nation to a landlord who gives a visiting nation a temporary leasehold interest in the property).

⁴⁷ HANDBOOK OF VISITING FORCES, *supra* note 32, at 374.

⁴⁸ See, e.g., Japan-SOFA, *supra* note 42, Art. VII (granting the U.S. the ability to use “public utilities and services belonging to, or controlled or regulated by the Government of Japan”).

⁴⁹ See *id.* at Art. XVII (providing a framework for criminal prosecution where Japanese and U.S. authorities “shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence”).

⁵⁰ The Japan-SOFA has been amended four times since 1960. The first amendment occurred on Jan. 19, 1960, to include a provision about the costs of maintaining U.S. forces in Japan. The remaining three amendments, occurring in 1995, 2000, and 2006, cover jurisdiction over U.S. personnel in serious criminal cases. For example, the 1995 amendment came after the rape of a woman by U.S. personnel kindled furious outrage among Japanese citizens.

framework that addresses both the needs of the United States military and the Japanese government.⁵¹

Environmental concerns were not addressed when the Japan-SOFA was initially negotiated.⁵² Even today, no provision expressly establishes the process of handling environmental issues. However, Article XXV of the Japan-SOFA does provide a possible resolution for environmental violations.⁵³ The purpose of Article XXV is to establish a committee to meet on matters that arise over facilities used by the United States.⁵⁴ The committee is comprised of two representatives (one from each government) plus any number of deputies and staff members.⁵⁵ Either representative may call a meeting at any time whenever an issue arises.⁵⁶ Currently, this provision is the only avenue to resolve environmental disputes between the United States and Japan. If the two representatives are unable to resolve a matter, the only remedy is to allow the two representatives to return to their respective governments for further consideration; there is no provision for resolving the dispute by a third-party neutral or a tie-breaking vote.⁵⁷

A separate provision explicitly eliminates any responsibility of the United States to clean up military facilities in Japan in the event of withdrawal. Article VI of the Japan-SOFA provides:

The United States *is not obligated*, when it returns facilities and areas to Japan on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration.⁵⁸

Other SOFAs include similar provisions, but not every SOFA has a provision similar to Article VI.⁵⁹ Of course, the United States could always

⁵¹ HANDBOOK OF VISITING FORCES, *supra* note 32, at 365.

⁵² See Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. U.L. REV. 403, 420–21 (2000) (advocating for parties in negotiation to consider outside environmental interest, rather than their own personal interest).

⁵³ Japan-SOFA, *supra* note 42, Art. XXV, §1.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at Art. XXV, §3.

⁵⁸ Japan-SOFA, *supra* note 42, Art. VI (emphasis added).

⁵⁹ See, e.g., Agreement Concerning the Status of U.S. Forces in Australia, May 9, 1963, 14 U.S.T. 506 (containing provisions that have a general understanding on clean-up as distinguished from the Japan-SOFA and using negative assertions regarding property damage: if the U.S. is solely responsible for the property damage in Australia, it shall pay 75% and Australia 25%).

reimburse Japan if it so chooses; however, no agreement expressly provides that it *must* pay for remediation costs.

While the Japan-SOFA is an agreement between the two nations, many critics believe that it is a unilateral agreement that favors only the United States.⁶⁰ Japanese citizens have begun to call for the revision of the Japan-SOFA for the purpose of clarifying ambiguous provisions.⁶¹ For example, section 1 of Article III allows the United States to take “all the measures necessary for the establishment, operation, safeguarding and control” of military bases in Japan.⁶² While paragraph 3 of Article III narrows the scope of power by limiting forces that are in “due regard for the public safety,” many Japanese officials have traditionally been willing to permit the United States to operate with such broad authority in order to defend Japan against a potential attack.⁶³ Broad provisions of power, such as this one, have generated a growing concern that United States personnel are able to escape Japanese domestic law regarding its general military operations.

The Japan-SOFA is not a standardized treaty that mirrors other SOFA agreements between the United States and host nations. Every SOFA negotiation is unique in what one party is willing to give in exchange for an added provision. The question remains whether the Japan-SOFA, in its current form, is adequate to address environmental concerns for a functional relationship in the twenty-first century.

IV. EXTRATERRITORIAL REGULATIONS AND PROVISIONS

The purpose of this section is to address which environmental laws apply to United States installations abroad. There are many different layers of regulations that may apply to federal action taken on overseas bases – relevant authority consists of international agreements, statutory law, executive orders, and agency regulations. The key is to determine which layer of regulation applies to a federal action abroad. National security interests must be balanced against the applicable environmental provision. In addition, United States

⁶⁰ See Ian Roberts McConnel, *A Re-Examination of the United States-Japan Status of Forces Agreement*, 29 B.C. INT'L & COMP. L. REV. 165, 171-74 (2006) (discussing the arguments made by critics that the U.S.-Japan SOFA is an infringement upon Japanese sovereignty). *But see* Jaime M. Gher, Comment, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons to Be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV. 227, 229-30 (2002) (addressing the benefits that U.S. service members have by the unequal apportionment between the two nations in the SOFA).

⁶¹ See HANDBOOK OF VISITING FORCES, *supra* note 32, at 406 (stating local officials want U.S. military to conform to Japanese domestic law rather than escape criminal prosecution by applying U.S. law).

⁶² Japan-SOFA, *supra* note 42, at Art. III.

⁶³ HANDBOOK OF VISITING FORCES, *supra* note 32, at 406.

federal courts are unwilling to apply many environmental laws to military actions abroad.

A. National Environmental Policy Act

The National Environmental Policy Act (NEPA) plays an important role in applying broad power to federal actions that “affect[] the quality of human environment.”⁶⁴ Enacted in 1970, Congress made a broad statement that it intended to consider the environment before taking any action.⁶⁵ Requirements of NEPA include the following: (1) an agency must consider the environmental consequences of a proposed project,⁶⁶ and (2) the public must have access to information about the proposed federal action.⁶⁷ The statute further provides that an environmental impact statement (EIS) shall be composed before the federal action is taken.⁶⁸ After the EIS is complete, a potential DoD action is reviewed by a federal agency that has jurisdiction over the possible environmental impact.⁶⁹ These statements require a federal agency to evaluate the proposed DoD action in order to reduce the risk of an environmental hazard.⁷⁰ The NEPA analysis is important for reducing environmental hazards caused by the DoD operating inside the United States; however, this analysis is different when a federal agency action is taken abroad.⁷¹

In 1979, President Carter issued an executive order in an attempt to balance both environmental and international issues.⁷² The executive order provided that NEPA would apply abroad when the action impacts a foreign

⁶⁴ National Environmental Policy Act, 42 U.S.C.A. §§ 4321–4347 (West 2000).

⁶⁵ See Daniel A. Farber, Symposium, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 921–22 (2008) (describing NEPA as a call by Congress to use available means to pursue environmental goals).

⁶⁶ See 42 U.S.C.A. § 4332(2)(C) (requiring an EIS be made for “Federal actions significantly affecting the quality of the human environment”).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See generally DYCUS, *supra* note 7, at 12–30 (discussing the application of NEPA to the U.S. military).

⁷² See Exec. Order No. 12,114, 3 C.F.R. 356 (Jan. 4, 1979) (ordering federal agencies to consider NEPA before acting abroad). Prior to this, President Carter attempted to implement U.S. environmental statutes to apply to federal actions overseas. See Exec. Order No. 12,088, 3 C.F.R. 243 (Oct. 13, 1978) (requiring the compliance of environmental regulations abroad in order to “ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction” and requiring compliance with local regulations). However, no agency complied with this Order, and it was later revoked in 2000. See Exec. Order No. 13,148, 65 Fed. Reg. 24,959 (Apr. 21, 2000) (stating the president may request an exemption to comply with environmental provisions for national security reasons).

country not involved in the action, when the action impacts the global commons, when the action exposes a foreign country to toxic or radioactive emissions, and when the action impacts resources of global concern.⁷³ However, the executive order also provided exemptions for intelligence activities, arms transfers, export licenses, votes in international organizations, and emergency relief.⁷⁴ Moreover, there was no private cause of action for parties to challenge harmful federal action.⁷⁵

Courts have been hesitant to apply NEPA to federal actions that occur outside the United States.⁷⁶ Courts start with the presumption that extraterritoriality does not apply to federal statutes; acts of Congress are presumed to apply only inside the United States.⁷⁷ The basic rule is that courts will not attempt to interpret the intent of Congress when the statute includes broad language.⁷⁸ NEPA is barred when the agency action is taken in a sovereign country in order to avoid “clashes between our laws and those of other nations.”⁷⁹

One noteworthy exception was the Court of Appeals for the District of Columbia’s analysis of NEPA’s extraterritorial application in nations that are not regulated by a sovereign. *Environmental Defense Fund v. Massey*⁸⁰ addressed the application of NEPA when the United States took actions for a mission in Antarctica. The Court reasoned that because there is no sovereign in Antarctica and the federal agency decision-making took place inside the United States, NEPA would apply.⁸¹ However, *Massey* is the exception to the rule.⁸²

When dealing with cases that involve national security or foreign policy, courts are unwilling to extend NEPA.⁸³ Actions in Japan are no exception. In *NEPA Coalition of Japan v. Les Aspin*,⁸⁴ the Court of Appeals for

⁷³ Exec. Order No. 12,114, 3 C.F.R. 356 (Jan. 4, 1979).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *But see* *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (applying NEPA to federal action taken in Antarctica).

⁷⁷ *See* *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (noting that U.S. statutes do not apply with the force of law in Saudi Arabia (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284–85 (1949))).

⁷⁸ *Arabian American Oil Co.*, 499 U.S. at 249.

⁷⁹ *Massey*, 986 F.2d at 530.

⁸⁰ *Id.*

⁸¹ *Id.* at 536.

⁸² *Id.*

⁸³ *But see* S. 1089, 101st Cong., 1st Sess., 135 Cong. Rec. S5990 (daily ed. June 1, 1989) (attempting to amend NEPA to apply overseas, except for actions “taken to protect the national security of the United States, actions taken in the course of armed conflict, strategic intelligence actions, armament transfers, or judicial or administrative civil or criminal enforcement actions”).

⁸⁴ *NEPA Coalition of Japan v. Les Aspin*, 837 F.Supp. 466 (D.D.C. Nov. 30, 1993).

the District of Columbia addressed the issue of whether NEPA would apply to the United States Navy operating in Japan. Plaintiffs sought the EIS requirement of NEPA to apply to American installations located in Japan.⁸⁵ The court began its analysis by noting that there is a presumption that statutes do not apply extraterritorially.⁸⁶ The court continued by noting that DoD operations are governed by a number of treaty agreements – most notably the Japan-SOFA – that may govern environmental issues.⁸⁷ The D.C. Court of Appeals concluded by stating that there “are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power.”⁸⁸

B. CERCLA and Other U.S. Provisions

The Comprehensive Environmental Response, Compensation, and Liability Act⁸⁹ (CERCLA) is another statutory provision that allows for clean-up costs of environmental hazard sites. The provision is applicable to a military base when a closure occurs.⁹⁰ The statute allows the Environmental Protection Agency (EPA) to conduct an investigation of the damaged site after an Environmental Baseline Survey (EBS) is conducted for closure of a military installation.⁹¹ The EBS identifies potentially hazardous materials and allows the EPA to supervise the clean-up of a hazardous site.⁹² CERCLA has two basic provisions: (1) it authorizes certain emergency responses to hazardous material spills,⁹³ and (2) it authorizes long-term corrective measures for hazardous sites.⁹⁴ More importantly, CERCLA applies to all federal facilities except when the President makes an exception for national security.⁹⁵

⁸⁵ *Id.* at 467.

⁸⁶ *Id.* at 468.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9607(a)(4)(A) (West 1996).

⁹⁰ 42 U.S.C.A. § 9620.

⁹¹ See 10 U.S.C.A. § 2687(b)(1) (West 2000) (providing a base closure shall not occur unless an environmental evaluation occurs by the Secretary of Defense). *But see* 10 U.S.C.A. § 2687(c) (exempting the previous requirements in the event the president determines the closure is for national security reasons).

⁹² 42 U.S.C.A. § 9620.

⁹³ 42 U.S.C.A. § 9604.

⁹⁴ 42 U.S.C.A. § 9605. See also James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 106 (2002) (reviewing the applicability of CERCLA requirements to military installations).

⁹⁵ See 10 U.S.C.A. § 2687(c) (exempting the federal requirements in the event the president determines the closure is for national security reasons).

One important feature of CERCLA, for purposes of this discussion, is a provision known as the Defense Environmental Restoration Account.⁹⁶ This allows Congress to cover the costs of clean-up for a DoD facility. However, this provision applies only to the domestic clean-up of DoD facilities; application of this account does not apply abroad.⁹⁷ Thus, in the event of a foreign base closure, a DoD Directive will guide the clean-up process, rather than a comprehensive CERCLA proceeding.

One statute that does expressly apply abroad is the National Historic Preservation Act (NHPA).⁹⁸ The NHPA provides a general policy statement that the federal government shall protect “historical and cultural foundations” of the international community.⁹⁹ Before a federal action is taken, the NHPA specifically provides that federal agencies are required to take into account the impact of any building or site¹⁰⁰ identified on the World Heritage List.¹⁰¹ Upon considering the action, third parties are given an opportunity to address the potential harm done to a local community.¹⁰²

In a unique case discussing the extraterritoriality of congressional statutes, the Northern District of California addressed the application of the NHPA to a tropical island near Okinawa in *Dugong v. H. Rumsfeld*.¹⁰³ The problem arose with the construction of a new building on a Marine Corps Air Base in Okinawa, Japan that interfered with the Okinawa dugong – an isolated population of a native marine mammal located off the coast of Okinawa.¹⁰⁴ The plaintiffs alleged that under NHPA they were not given the proper opportunity to comment before the building of the new office, which interfered with the Okinawa dugong.¹⁰⁵ The plaintiffs’ ultimate concern was extinction of this

⁹⁶ See 10 U.S.C.A. § 2703 (2000) (establishing certain funds for the DoD to use in the clean-up of an environmental hazard at the time of a base closure).

⁹⁷ See U.S. DEP’T OF DEFENSE, INSTRUCTION 4715.7, ENVIRONMENTAL RESTORATION PROGRAM, at 2.2, (Apr. 22, 1996) available at <http://www.dtic.mil/whs/directives/corres/pdf/471507p.pdf> (stating that the fund shall apply only to military installations that are within the U.S.).

⁹⁸ 16 U.S.C.A. § 470 (West 2000).

⁹⁹ 16 U.S.C.A. § 470 (b)(2) (West 2000).

¹⁰⁰ See 16 U.S.C.A. § 470a(a)(2)(D) (West 1994) (providing the consideration of the World Heritage List as enacted by the Convention concerning Protection of the World Cultural and Natural Heritage).

¹⁰¹ The World Heritage List is a collection of landmarks across the globe that holds significant importance to a specific culture. The list is organized and maintained by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”). See Convention for the Protection of the World Cultural and Natural Heritage, art. 5, Nov. 23, 1972, 27 U.S.T. 37; see also World Heritage, UNESCO, <http://whc.unesco.org/en/list> (last visited Sep. 3, 2009).

¹⁰² 16 U.S.C.A. § 470a(d)(1)(C) (West 1994).

¹⁰³ *Dugong v. H. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *1 (N.D. Cal. Mar. 2, 2005).

¹⁰⁴ *Id.* at *3.

¹⁰⁵ *Id.*

marine mammal as a result of construction from the new Marine Corps facility.¹⁰⁶ Secretary Rumsfeld objected by filing for summary judgment, arguing that the claim deserved dismissal because the NHPA did not apply in foreign nations. The court denied Secretary Rumsfeld's summary judgment, noting that when applying NHPA abroad, the DoD failed to show an official act of a foreign sovereign performed within its own territory.¹⁰⁷ *Dugong v. H. Rumsfeld* is a rare exception to the application of federal statutes abroad.

C. Department of Defense Directives

The final layer of regulation applicable for this review is the DoD directives. These regulations are a complex web of agency regulations enacted for the purpose of interpreting federal statutes in order to comply with issued executive orders and congressional statutes.¹⁰⁸ After the National Defense Authorization Act of 1991, the DoD was forced to adopt environmental standards abroad.¹⁰⁹ In accordance with its enabling act, the DoD noted that it would "establish a baseline guidance document for the protection of the environment at DoD installations and facilities outside U.S. territory."¹¹⁰ However, not all remedial clean-up as a result of past activities is considered applicable to the DoD directives.¹¹¹

DoD Directive 6050.7 is one of the more important regulations in establishing environmental policies for the military acting abroad.¹¹² The directive mirrors the domestic application of NEPA to military installations overseas by requiring the completion of an environmental survey prior to a

¹⁰⁶ *Id.* at *6.

¹⁰⁷ *Id.* at *18.

¹⁰⁸ See generally Phelps, *supra* note 46, at 54–57 (1996) (discussing the application of DoD Directives at U.S. military installations abroad).

¹⁰⁹ National Defense Authorizing Act of 1991, Pub.L. No. 101–510, § 342(b)(1), 104 Stat. 1485, 1537–38 (1990).

¹¹⁰ U.S. DEP'T OF DEFENSE, DIRECTIVE 6050.16, DO D POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS LOCATIONS (Sept. 20, 1991) (cancelled April 19, 2004) [hereinafter DOD DIR. 6050.16], available at srp.usmc.googlepages.com/DOD6050.16PolicyEstablishEnvironment.pdf; see also U.S. DEP'T OF DEFENSE, DIRECTIVE 6050.1, ENVIRONMENTAL EFFECTS IN THE UNITED STATES OF ENVIRONMENTAL ACTIONS (July 30, 1979) (cancelled September 10, 1998) (providing policy procedures to consider environmental statutes for major federal action).

¹¹¹ See, e.g., DOD DIR. 6050.16 at 2.5 (stating the regulation does not apply to the clean-up of past activities); but see DOD DIR. 6050.16 at 2.3. (exempting the directive to apply to actions by U.S. naval vessels).

¹¹² U.S. DEP'T OF DEFENSE, DIRECTIVE 6050.7, ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS, (Mar. 31, 1979) [hereinafter DOD DIR. 6050.7], available at <http://www.dtic.mil/whs/directives/corres/pdf/605007p.pdf>.

federal action.¹¹³ Moreover, it establishes review procedures and documentation requirements for the review process.¹¹⁴ However, this Directive also authorizes the DoD to request an exemption.¹¹⁵ Thus, Directive 6050.7 does not totally bind the United States to environmental clean-up.

Coming out of this directive, the DoD implemented the Overseas Environmental Baseline Guideline Document (OEBGD).¹¹⁶ The OEBGD establishes a minimum of environmental standards for overseas bases.¹¹⁷ The OEBGD requires DoD authorities to compare the DoD environmental directives to regulations and guidelines of the host nations, and to decide which is the most protective of the environment.¹¹⁸ The DoD will then impose a “final governing standard” for the specific military installation that will apply the more stringent of the two statutes.¹¹⁹ This process is important in abiding with the host nation’s regulations for federal actions.¹²⁰ However, the DoD directives do not apply with the force of law when dealing with environmental remediation abroad.¹²¹ Similar to previous DoD directives, the OEBGD does not apply to clean-up of prior DoD actions.¹²² This exception applies in order to balance the interest of national security with environmental standards. Therefore, remediation of prior DoD actions abroad is not covered by the directives.

V. ANALYSIS: ENVIRONMENTAL MISMANAGEMENT STRAINS INTERNATIONAL RELATIONS WITH JAPAN

International concern regarding the environmental impact of U.S.S. Houston and U.S.S. George Washington has produced a heated debate among

¹¹³ See *id.* at E1.3.1. (requiring an environmental impact statement before the federal action is taken); *but see id.* at E.1.3.3. (disregarding the environmental impact statement in emergency situations).

¹¹⁴ *Id.* at E1.3.9.

¹¹⁵ See *id.* at E2.3.3.1.10. (providing for an exemption to be made on a case-by-case basis).

¹¹⁶ U.S. DEP’T OF DEFENSE ENV’T L OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (May 1, 2007) [hereinafter OEBGD], *available at* <http://www.dtic.mil/whs/directives/corres/html/471505g.htm>.

¹¹⁷ See *id.* at C1.4.5.1. – C1.4.5.3. (providing a framework to apply either U.S. environmental law, host nation law, or specific provisions of SOFA agreements).

¹¹⁸ See, e.g., *id.* at C1.3.5. (implementing pollution prevention as a preferred governing standard while operating in a host nation).

¹¹⁹ *Id.* at C1.1.

¹²⁰ See *id.* at C1.1. (adopting U.S. DEP’T OF DEFENSE, INSTRUCTION 4715.5, MANAGEMENT OF ENVIRONMENTAL COMPLIANCE AT OVERSEAS INSTALLATIONS (APRIL 22, 1996), which recognizes the host nation’s environmental regulations).

¹²¹ See, e.g., OEBGD, *supra* note 116, at C6.3.1.4.1.2. (stating the SOFA is the relevant authority when dealing with hazardous materials).

¹²² See *id.* at C1.3.5. (stating the guide does not apply to past environmental problems caused by the DoD); see also OEBGD at C1.5.6. (disclaiming any “rights or obligations enforceable against the United States, the Department of Defense, or any of its components”).

Japanese citizens about the presence of American naval forces.¹²³ A strong local backlash will strain relations with the United States, and therefore cause Japanese politicians to limit the amount of American military.¹²⁴ Recommendations are needed in order to improve both environmental standards for overseas bases and national security.¹²⁵ First, this section will look at past events that occurred in the Philippines as a case study for what could happen as a result of an inadequate international agreement. Second, this section will discuss how SOFAs have evolved in recent history to include additional environmental remediation provisions. Lastly, this section recommends that, in Japan's case, an environmental remediation provision is necessary to calm current hostilities toward the American military.

A. Clark Air Force Base and Naval Station Subic Bay as Case Studies

In 1946, the Republic of the Philippines gained independence after years of colonization at the hands of Spain, beginning in 1571, and then the United States.¹²⁶ Soon thereafter, the United States negotiated the Military Bases Agreement of 1947 in order to provide military assistance, training, and support for the Republic of the Philippines.¹²⁷ Despite an independent Philippine government, the United States would retain its military installations in order to accomplish national security objectives in the South Pacific following World War II.¹²⁸ Believing that the Military Bases Agreement and a few other treaties¹²⁹ were not enough to provide adequate assurances between

¹²³ See Talmadge, *supra* note 14 (discussing the strong backlash by Japanese citizens as a result of the arrival of U.S.S. George Washington).

¹²⁴ See, e.g., Howard W. French, *Sub Accident Shakes Japan's Security Ties with U.S.*, N.Y. TIMES, Feb. 23, 2001, at A3 (reporting that U.S.S. Greenville accidentally sank a Japanese fishing vessel in 2001, which then created debate among citizens about the permanent presence of U.S. forces in Japan); see also Thom Shanker, *U.S. Sub and Japanese Vessel Collide*, N.Y. TIMES, Jan. 9, 2007, at A9 (discussing the collision between a U.S. nuclear submarine and a Japanese commercial vessel in the Arabian Sea).

¹²⁵ See DYCUS, *supra* note 7, at xiii (stating "[t]here is a growing consensus in this country that the environment itself is worth defending at home and abroad – that environmental protection is an aspect of national security").

¹²⁶ See Treaty of General Relations Between the Republic of the Philippines and the United States, July 4, 1946 (recognizing the Republic of the Philippines as an independent sovereign).

¹²⁷ Agreement Between the Government of The United States of America and the Government of the Republic of Philippines on Mutual Assistance to the Philippines, U.S.-Phil., Mar. 21, 1947, 61 Stat. 3283.

¹²⁸ See Kim David Chanbonpin, *Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, A Plan for the Future*, 4 ASIAN-PAC. L. & POL'Y J. 320, 333 (2003) (discussing the U.S. objectives in retaining control in its military bases once the Philippines gained independence).

¹²⁹ For example, a mutual defense treaty was entered into in 1951 providing that both parties will protect each other from potential aggressors. Mutual Defense Treaty Between the United States of America and Republic of the Philippines, Aug. 30, 1951, 3 U.S.T. 3947.

the two parties, a SOFA was drafted. The Military Bases Agreement was set to expire on September 16, 1991.¹³⁰

By the late 1980s, relations between the Philippines and United States became significantly strained.¹³¹ A wave of nationalism spread across the country as Filipino culture sought its own identity outside the shadow of the United States.¹³² The Philippine government sought an increase in the annual compensation paid by the United States,¹³³ in addition to a prohibition against nuclear weapons.¹³⁴ An agreement between the two nations was reached; however, the Philippine Senate failed to ratify the treaty.¹³⁵ Upon the expiration of the Philippine treaties, no negotiations were made addressing environmental clean-up.¹³⁶

In June of 1991, while the fallout of international relations with the Philippine government was ongoing, the Mt. Pinatubo volcano erupted.¹³⁷ Mt. Pinatubo was located near Clark Air Force Base.¹³⁸ Seeking a safe place for shelter, local residents entered the base, using the remaining facilities the United States left behind.¹³⁹ The families remained in Clark for years after the eruption occurred because the nearby villages had been destroyed; Clark was their new

¹³⁰ DAVID JOEL STEINBERG, *THE PHILIPPINES, A SINGULAR AND A PLURAL PLACE* 177 (Westview Press 2000).

¹³¹ See Robert Pear, *The U.S. Stake in the Philippines*, N.Y. TIMES, Dec. 17, 1989, at 43 (discussing the hostility between the Philippine government and the U.S.).

¹³² See STEINBERG, *supra* note 130, at 175 (stating that Filipinos were looking to get rid of the “American father image”).

¹³³ See Seth Mydans, *Philippine Critics Assault U.S. Accord*, N.Y. TIMES, Oct. 19, 1988, at A5 (reporting that the U.S. paid \$962 million in direct aid and \$500 million in indirect assistance that year).

¹³⁴ In 1987 the Philippine Senate passed a Bill of Rights declaring itself independent of foreign policy decisions, and free of nuclear weapons. Phil. Const. art. II, §§ 7 and 8.

¹³⁵ See Chanbonpin, *supra* note 128, at 334 (reviewing events in the Philippine Senate that led up to the expiration of the international treaties).

¹³⁶ See Bayoneto, *supra* note 9, at 120–24 (1994) (discussing events leading up to the pullout of the Philippines without preparing environmental assessment procedures according to DoD directives).

¹³⁷ See generally U.S. Geological Survey-Reducing the Risk From Volcanic Hazards, *The Cataclysmic 1991 Eruption of Mount Pinatubo, Philippines* (USGS Fact Sheet 113-97, Reprinted 1998), available at <http://pubs.usgs.gov/fs/1997/fs113-97/fs113-97.pdf> (noting the volcanic eruption was the second largest of the twentieth century).

¹³⁸ Originally established in 1903 as an Army base, Clark Air Force Base provided a strategic launching pad in the Pacific Rim. 2 HARRY R. FLETCHER & ROBERT MUELLER, *AIR FORCE BASES OUTSIDE THE UNITED STATES* 22 (1993). During World War II, the base was overtaken by Imperial Japan; however, it was then recaptured in 1945 by American forces. *Id.* at 24. Throughout the Vietnam War, Clark provided logistical support to ground forces, in addition to playing an integral role for bombing missions. *Id.*

¹³⁹ See Michael Satchell, *What the Military Left Behind*, U.S. NEWS & WORLD REPORT, Jan. 24, 2000 (reporting nearby locals entered Clark upon the eruption of Mt. Pinatubo, and then dug wells for drinking water); see also Chanbonpin, *supra* note 128, at 345 (citing 20,000 families moved into Clark because of the eruption of Mt. Pinatubo).

home.¹⁴⁰ While living at Clark, the local civilians dug ground wells for drinking water and farmed the land.¹⁴¹ After a few years of living at Clark, local natives became ill with leukemia, women gave birth to stillborn babies, and others developed cancers and skin diseases.¹⁴² It was later discovered that millions of gallons of sewage, oil, and chemicals were dumped into the groundwater during the life of Clark.¹⁴³

Similar events occurred at Naval Station Subic Bay.¹⁴⁴ As a result of the eruption of Mt. Pinatubo, Subic Bay sustained substantial damage to its buildings and infrastructure.¹⁴⁵ Determining that the cost to repair the base was too great, a decision was made to abandon Subic Bay.¹⁴⁶ The base was stripped of its fixtures and deserted.¹⁴⁷ However, after decades of dumping heavy metals and other hazardous materials, substantial contamination was left behind.¹⁴⁸

The United States pulled out of both Clark and Naval Station Subic Bay without executing an environmental impact statement.¹⁴⁹ The expired

¹⁴⁰ Satchell, *supra* note 139.

¹⁴¹ *Id.*

¹⁴² *See id.* (reporting that medical workers began documenting major health problems, such as a rise of spontaneous abortions, and kidney and nervous system disorders).

¹⁴³ *See* U.S. Gen. Acct. Off., Military Base Closures: U.S. Financial Obligations in the Philippines 27-28, GAO/NSIAD-92-51 (Jan. 1992) [hereinafter *1992 GAO Report*] (finding, at the request of the U.S. Senate subcommittee on defense, that heavy metals, untreated chemicals, and toxic waste pollution were discharged into the ground at Clark); *see also* Satchell, *supra* note 139 (stating that the DoD spent \$2 billion “on cleaning up at installations in the United States and its territories, but only \$18.6 million in Great Britain, Germany, Belgium, Italy, Japan, and South Korea. The Philippines gets nothing”).

¹⁴⁴ Similar to Clark A.F.B., Naval Station Subic Bay was a massive overseas installation for the DoD. STEINBERG, *supra* note 130, at 111. Subic Bay acted as a launching pad for U.S. Naval forces during the Vietnam War. *Id.* at 119. After the closure of Clark in 1991, the Philippine government offered the U.S. a ten-year extension at Subic Bay for a cost of \$203 million per year. *Id.* at 179. However, with the fallout of relations with the Philippine Senate and the declining threat of the Russian Navy, the U.S. announced that it would close Subic Bay. *Id.* at 180. U.S. Marines formally lowered the American flag on Nov. 24, 1992. *Id.* at 205.

¹⁴⁵ *Chaos Curbs Talks on U.S. Presence in Philippines*, ARMY TIMES, July 16, 1991, at 20.

¹⁴⁶ STEINBERG, *supra* note 130, at 180.

¹⁴⁷ *Id.* at 200.

¹⁴⁸ *See, e.g., 1992 GAO Report, supra* note 143, at 27–28 (finding that U.S. personnel were discharging sewage and processed waste waters directly into Subic Bay). *See also* Michael Satchell, *The Mess We’ve Left Behind*, U.S. NEWS & WORLD REPORT, Nov. 30, 1992 (citing a 1991 GAO report stating that the DoD is not in compliance with environmental laws at bases in Japan, Germany, England, Italy, and the Philippines) (citing also that Yokosuka Naval Station in Japan was so heavily tainted with soil contaminated with PCBs and heavy metals that it could not be legally disposed of in a landfill).

¹⁴⁹ Lawsuits were filed against the DoD alleging that the U.S. was required to conduct an environmental assessment. However, none have succeeded because U.S. environmental statutes do not apply abroad. *See, e.g., ARC Ecology v. U.S. Dept. of the Air Force*, 411 F.3d 1092, 1096 (9th Cir. 2005) (discussing the factual background of a claimant’s CERCLA petition that the U.S. failed to conduct an environmental assessment, and concluding that CERCLA does not apply abroad).

Philippine treaties provided for no express provision to conduct past or current environmental remediation. The Philippine government simply did not foresee possible environmental harms that could arise when it negotiated agreements in 1947. Events at Clark and Subic Bay provide important case studies for reasons to improve environmental remediation with host nations.¹⁵⁰ Here, the end result was the loss of two strategically located military bases in the Pacific Rim, in addition to a number of health hazards imposed on Filipino civilians.¹⁵¹ Clark and Subic Bay are examples of what should not happen when a modern American military operates abroad.

B. Emergence of Environmental Provisions in SOFA Agreements

One recent example of an environmental remediation provision in a SOFA came in 1993 when NATO forces amended an original 1959 SOFA with Germany.¹⁵² After Germany went through unification and implemented law reform, there was a strong public outcry to permanently expel allied forces as a way to regain full sovereignty.¹⁵³ Realizing NATO would soon be asked to leave, it decided to negotiate and adopt a number of new provisions as a way to keep its military installations in Germany.¹⁵⁴

The 1993 SOFA amendment addresses German concerns over environmental damage done to property.¹⁵⁵ Specifically, the amended SOFA now includes broad environmental provisions.¹⁵⁶ For example, Article 63 of the German-SOFA provides that:

¹⁵⁰ See, e.g., John S. Applegate, Book Review, *National Security and Environmental Protection: The Half-Full Glass*, 26 *ECOLOGY L.Q.* 350, 355 (1999) (estimating that the DoD possesses about 13,000 potentially contaminated sites at 172 installations, and costs could reach as high as \$30 billion in clean-up).

¹⁵¹ There is no doubt that the use of Clark and Subic Bay would provide optimal support in the War on Terror. In Afghanistan, key logistical support is now needed to move and supply troops in the region. See, e.g., Ellen Barry, *Kyrgyzstan: U.S. Allies Will Be Told To Leave Air Base*, N.Y. TIMES, Mar 7, 2009, at A6 (reporting the recent closure of Manas Air Force base after the Kyrgyzstan Parliament voted out the presence of U.S. forces). Moreover, the presence of al Qaeda in the Philippines has improved its sophistication as a central base for money-laundering and training. See Raymond Bonner, *Officials Fear New Attacks by Militants in Southeast Asia*, N.Y. TIMES, Nov. 22, 2003, at A9 (reporting the Philippines has become a center for money-laundering and training). Events in the Philippines cannot occur in Japan.

¹⁵² Amendments to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, Mar. 18, 1993 [hereinafter German-SOFA]; see also Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531 (effective July 1, 1963).

¹⁵³ HANDBOOK OF VISITING FORCES, *supra* note 32, at 358.

¹⁵⁴ German-SOFA, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* at art. 54A(1) (acknowledging the importance of environmental protection with operating in the Federal Republic of Germany), *id.* art. 54A(2) (requiring NATO forces to conduct an

A [NATO military] force . . . *shall* in accordance with this paragraph bear costs arising in connection with the assessment, evaluation and remedying of hazardous substance contamination caused by it and that exceeds then-applicable legal standards. . . . The authorities of the force or of the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the Government of the sending State.¹⁵⁷

Recognizing the environmental impact NATO forces have on local communities, Germany was successfully able to negotiate monetary liability on visiting forces in the event of property damage.¹⁵⁸ Only when threatened with the expulsion of military forces from Germany were NATO forces willing to consider including environmental provisions.

The German model is noteworthy in the context of Japan. Similar to Germany, Japan has a significant concern regarding actions by United States forces currently stationed within its borders. Additionally, the American military presence has a considerable impact on local residents and communities. For example, complaints are made about noise pollution that comes from United States air bases.¹⁵⁹ Similarly, local communities near Yokosuka Naval Base are concerned about the presence of American nuclear ships.¹⁶⁰ Given this current unpopularity, there is a valid concern that if events like U.S.S. Houston and U.S.S. George Washington continue, there may be a significant strain on relations to the point of losing permission to dock our ships in Japan.¹⁶¹

As stated in section two of this article, the current Japan-SOFA provides for one representative from each country to meet in order to resolve a potential environmental hazard.¹⁶² The concern is that the current system sends

environmental assessment before a military action is taken), and *id.* at art. 53(5)(g) (requiring forces to recognize the impact of environmental protection).

¹⁵⁷ German-SOFA, *supra* note 152, at art. 64(8bis.) (b) (emphasis added).

¹⁵⁸ *See id.* at article 64(8bis.) (a) (requiring forces to pay costs to prevent “physical environmental damage”).

¹⁵⁹ *See High Court Orders Japan Gov’t to Pay Damages over U.S. Base Noise*, JIJI PRESS ENG. NEWS SERV., July 13, 2006, 2006 WL 12094900 (reporting that the Japanese government was liable for 4.04 billion yen to 4,800 people as a result of noise pollution from U.S. military bases).

¹⁶⁰ *See Eric Talmadge, Nuclear Warships In Japan Touch a Nerve*, ASSOCIATED PRESS, Feb. 15, 2009 available at http://www.navytimes.com/news/2009/02/ap_japan_nuclear_ships_021509/ (discussing the strong local concern against the presence of American nuclear warships in Japan).

¹⁶¹ *See Phelps, supra* note 46, at 87 (addressing the growing controversy between host nations and the DoD over environmental clean-up).

¹⁶² Japan-SOFA, *supra* note 42, at Article XXV, §1.

a message to citizens of Japan that the United States military may not be responsible for harm caused by its actions. The current Japan-SOFA is not adequate for the twenty-first century when there is considerable scientific data regarding the environmental impact of nuclear materials.¹⁶³ A major overhaul of the Japan-SOFA, to account for environmental concerns, is needed to meet the demands for the relationship with Japan. The current agreement is better suited for 1960 – the year it was negotiated.

As SOFA agreements progress, there is a strong public policy argument for environmental provisions to start appearing more frequently.¹⁶⁴ The question then becomes, how long until these provisions start to appear? Unfortunately, the United States is unlikely to bind itself to a costly environmental provision.¹⁶⁵ Such a provision may cost the DoD billions of dollars in liability for clean-up.¹⁶⁶ However, in the case of Japan, such a provision is needed in order to preserve national security by maintaining positive relations. As new SOFA agreements with host nations are negotiated,¹⁶⁷ it will be important to consider how environmental remediation is addressed.

¹⁶³ See generally Leonard S. Spector & Geoffrey B. Shields, *Nuclear Waste Disposal: An International Legal Perspective*, 1 NW. J. INT'L L. & BUS. 569, 573 (1979) (examining the environmental impact of nuclear waste released into the ocean and nuclear wastes deposited into groundwater).

¹⁶⁴ See, e.g., Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Nov. 17, 2008 (stating explicitly that under art. 8, the U.S. agrees to “respecting applicable Iraqi environmental laws, regulations, and standards in the course of executing its policies”).

¹⁶⁵ It is worthy to note the counter-argument against binding the U.S. to an environmental remediation provision. Such a provision is likely to cost billions of U.S. dollars in the event accidents occur. See Maria B. Montes, *U.S. Recognition of Its Obligation to Filipino Amerasian Children Under International Law*, 46 HASTINGS L.J. 1621, 1639 n.128 (1995) (noting the estimated clean-up of Subic Bay alone could cost \$8 billion). Moreover, applying U.S. environmental policy abroad to international partners has the effect of those nations failing to develop their own environmental regulations. See Developments in the Law, *Extraterritorial Environmental Regulation*, 104 HARV. L. REV. 1609, 1638 (1991) (arguing the extraterritoriality of U.S. environmental regulations is not always desirable). While there are potential problems with the argument of binding the U.S. to an environmental remediation provision in the Japan-SOFA, the threat of losing our military presence in Japan is far greater than the cost of cleaning up any environmental liabilities.

¹⁶⁶ The DoD has already spent billions of dollars cleaning up environmental liabilities. See Keith Schneider, *Military Has New Strategic Goal in Cleanup of Vast Toxic Waste*, N.Y. TIMES, Aug. 5, 1991, at A1 (reporting in 1991 that the DoD planned to spend \$400 billion over the next thirty years on environmental clean-up, which cost more than four times as much as the Mercury, Gemini, and Apollo space programs combined and \$100 billion more than the interstate highway system).

¹⁶⁷ See, e.g., Greg Bruno, Counsel on Foreign Relations, *U.S. Security Agreements and Iraq*, available at <http://www.cfr.org/publication/16448/> (discussing successful negotiations for the recently approved Iraq-Status of Forces Agreement).

VI. RECOMMENDATION: AMEND JAPAN-SOFA TO INCLUDE ENVIRONMENTAL REMEDIATION

The United States should amend the Japan-SOFA to include a provision that covers remediation in order to improve relations with Japan, gain credibility with foreign partners, and improve environmental standards at overseas installations. This will ensure a long-term partnership with Japan. The provision will act as a sort of insurance policy for Japanese citizens and politicians who are already inflamed over the presence of American nuclear warships.¹⁶⁸ For the United States, the process begins with the DoD and the Department of State identifying the needs of operational forces working in a specific country.¹⁶⁹ At that point, the terms and conditions are negotiated between the parties. Herein lies the problem with contractually binding the United States to liability of environmental violations; there is no direct incentive for the DoD to include a term that will impose possible financial liability. However, the United States could immediately start improving both the environment of its installations and foreign relations with Japan by binding itself to a remediation plan; such action is consistent with balancing the needs of acting as an environmental steward while improving national security.¹⁷⁰

The DoD should consider not only whether its actions will benefit the United States, but also how this conduct is observed by the host nation. The DoD and Department of State should consider revising the Japan-SOFA expressly to include provisions that outline legal rights and responsibilities in the event of environmental violations.¹⁷¹ Such an action would send a clear message to Japanese citizens and politicians that the United States intends to take environmental clean-up seriously. Holding itself accountable will be an effective tool in establishing good faith with the Japanese.¹⁷² Establishing new

¹⁶⁸ It is important to demonstrate to the Japanese, as well as to other countries with an American military presence, that the DoD plans to hold itself accountable for any past or future damage done by the U.S. military. This sort of “you-break-it, you-buy-it” policy is consistent with other guarantees of accountability. See Thomas L. Friedman, *Present at . . . What?*, N.Y. TIMES, Feb. 12, 2003, at A37 (quoting Colin Powell saying, “We break Iraq – we own Iraq – and we own the primary responsibility for rebuilding a country of 23 million people. . . .”).

¹⁶⁹ See R. Chuck Mason, *supra* note 45.

¹⁷⁰ See Katharine Q. Seelye, *Defense Dept. Forum Focuses on Environment*, N.Y. TIMES, Feb. 6, 2003, at A28 (quoting Deputy Secretary of State Paul D. Wolfowitz stating that “[t]he challenge is nothing less than supporting the twin imperatives of producing the best-trained military force in the world and providing the best environmental stewardship,” and that “[n]ational security and environmental security are mutually reinforcing”).

¹⁷¹ See Gher, *supra* note 60, at 243 (recommending that the U.S. re-negotiate the Japan-SOFA to allow for more flexible changes in international agreements).

¹⁷² Cf. Charles M. Kersten, Note, *Rethinking Transboundary Environmental Impact Assessment*, 34 YALE J. INT’L L. 173, 177 (2009) (noting the importance of acting in good faith when adopting policies that are ecologically unsound).

provisions in the Japan-SOFA for environmental issues will improve working relations with Japan.¹⁷³

To date, the German-SOFA is the model for expressly providing for environmental remediation. Because of the long partnership with Japan – similar to the relationship with Germany – environmental provisions should be addressed to meet the current needs of this historic relationship. Recognizing and lessening environmental hazards will improve international relations.¹⁷⁴ When international partners are willing to work with the United States because of sound environmental policy, the direct result will strengthen national security.¹⁷⁵

Finally, the Japan-SOFA should be amended to include a better remedy in the event of a stalemate between representatives on the joint committee. As the Japan-SOFA currently stands, a stalemate is a very possible result when the two governments are negotiating.¹⁷⁶ This system is inefficient to handle important environmental decisions.¹⁷⁷ Amending the treaty is important in order to handle the current needs of both the host and visiting nations.¹⁷⁸ Moreover, amending the Japan-SOFA will meet demands to maintain a positive working relationship with Japan.¹⁷⁹

It is not believed that the Japanese will banish the United States any time in the short-term future.¹⁸⁰ The Japanese government benefits from the presence of American military forces for the purpose of self-defense. However, it is important to note the current unpopularity of the United States military operating in Japan. The long-term concern is that if more incidents such as the

¹⁷³ See Gher, *supra* note 60, at 251 (arguing for the U.S. and a host nation to have equal bargaining power in order to maintain positive working relations).

¹⁷⁴ See Jay D. Wexler, *The (Non)Uniqueness of Environmental Law*, 74 GEO. WASH. L. REV. 260, 286 (2006) (linking the impact of environmental injuries to international relations).

¹⁷⁵ See Kristen D. Wheeler, Note, *Homeland Security and Environmental Regulation: Balancing Long-Term Environmental Goals with Immediate Security Needs*, 45 WASHBURN L.J. 437, 461–62 (2006) (discussing the importance of balancing the short-term security needs with long-term environmental policy in order to strengthen national security).

¹⁷⁶ Japan-SOFA, *supra* note 42, at Article XXV, §1.

¹⁷⁷ See Gher, *supra* note 60, at 243 (criticizing the current Japan-SOFA for failing to adapt to the changing relationship).

¹⁷⁸ *Id.*

¹⁷⁹ See generally R. Chuck Mason, *supra* note 45 (noting the goal of most SOFA agreements is to provide maximum flexibility).

¹⁸⁰ See generally John M. Williams, *The Sun Rises Over the Pacific: The Dissolution of Statutory Barriers to the Japanese Market for U.S. Joint Ventures*, 22 LAW & POL'Y INT'L BUS. 441, 442 (1991) (examining deep military, financial, political, and trade relationships between the U.S. and Japan that have stabilized the region and improved the standard of living in both countries).

ones on U.S.S. George Washington and U.S.S. Houston continue to occur,¹⁸¹ however minimal, the United States will wear out its welcome as a guest in Japan. Repairing foreign relations on a diplomatic level will also be important in maintaining a positive image in the eyes of local Japanese citizens.¹⁸²

VII. CONCLUSION

Amending the Japan-SOFA to incorporate environmental provisions¹⁸³ will calm hostilities against the now-permanent stationing of nuclear vessels in Japan; the end result will improve the global image of the United States military. Traditionally the United States military has applied its leadership to set the tone in the international arena.¹⁸⁴ As technology continues to build bigger and better equipment for the DoD, environmental hazards are likely to increase.¹⁸⁵ It will be important to analyze how the DoD plans to balance national security interests with environmental concerns.¹⁸⁶ If environmental concerns are ignored in Japan, national security in the region is likely to be impacted.¹⁸⁷ If, however, environmental provisions are implemented to meet the current demands for an American nuclear navy stationed in Japan, the end result will improve foreign relations and regional stability in Asia. Binding ourselves to such a provision will raise the bar for the American military by improving environmental standards while strengthening national security. The two must be able to work together in the twenty-first century.

¹⁸¹ Even incidents by non-U.S. military have the potential to raise concern in Japan over the safety of nuclear vessels. See, e.g., John F. Burns, *Nuclear Missile Subs Collide, France and Britain Report*, N.Y. TIMES, Feb. 17, 2009, at A6 (reporting the collision of British and French submarines, both carrying nuclear weapons).

¹⁸² See Phelps, *supra* note 46, at 76 (discussing that the ultimate consequence of DoD's environmental failure could lead a host nation to determine whether the benefits of the U.S. presence are outweighed by the destructive environmental practices).

¹⁸³ Cf. Gher, *supra* note 60, at 254–55 (noting the U.S. should “incorporate morality into . . . international negotiations” in order to prevent relations with Japan from deteriorating).

¹⁸⁴ See Paul H. Nitze, *Foreword: International Security in a New World*, 81 GEO. L.J. 481, 487–88 (1993) (discussing prior issues that the U.S. military has applied its leadership in the past to resolve international problems).

¹⁸⁵ But see Peter Vietti, Office of Naval Research, *ONR-Developed Technologies Employed on CVN 77*, http://www.navy.mil/search/display.asp?story_id=41822 (discussing a more environmentally friendly septic tank system on the recently commissioned U.S.S. George H.W. Bush (CVN 77)).

¹⁸⁶ See DYCUS, *supra* note 7, at 186 (stating that “[e]nvironmental protection must be embraced by all segments of American society as a top national defense priority”).

¹⁸⁷ Cf. Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 82 (1992) (citing the traditional argument for the U.S. to retain many military bases abroad in order to strengthen national security).

THE SPECIAL NEEDS TRUST AND THE MILITARY CLIENT: THE CRITICAL ISSUE-SPOTTING ROLE OF THE LEGAL ASSISTANCE ATTORNEY

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I. INTRODUCTION

Over the course of a judge advocate's career, there is a good chance of an assignment to the local legal assistance office. Being a successful legal assistance attorney is more than drafting wills, powers of attorney, dissolution documents, and assisting in the usual consumer law issues. There are instances when clients may come into the office with what they believe is a simple issue, and not realize that they have a very complicated problem. It is up to the legal assistance attorney to identify that problem and offer the appropriate advice to the client. Sometimes the issue is too complex for a military legal assistance office to fully assist the client. However, being able to identify the issue, give the appropriate advice, and point the client in the proper direction can be of true value to the client.

Take the following example. A young service member enters the office for a will. During initial discussions, it is learned that she has a family member enrolled in the Exceptional Family Member Program (EFMP)¹ who is currently

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¹ Each service has a mandatory Exceptional Family Member Program which mandates that all service members identify dependents with special medical or educational needs. The applicable service regulations are: U.S. DEP'T OF AIR FORCE, INSTR. 40-701, SPECIAL NEEDS IDENTIFICATION AND ASSIGNMENT COORDINATION (8 Aug. 2008) [hereinafter AFI 40-701]; U.S. DEP'T OF ARMY, REG. 608-75, EXCEPTIONAL FAMILY MEMBER PROGRAM (22 Nov. 2006) [hereinafter AR 608-75];

receiving Supplemental Security Income (SSI) and Medicaid² assistance. Through the interview process, the legal assistance attorney learns that the service member wants her will to leave everything to her husband and in the event he predeceases her, then everything to their child. Additionally, her Servicemember's Group Life Insurance (SGLI) follows the same disbursement scheme. The unsophisticated legal assistance attorney may not recognize the potential problems that may come back to haunt the service member if she is allowed to leave the office with only a simple will.³ The savvy legal assistance attorney, however, identifies the need for advanced estate planning for this client. Instead of drafting a simple will, the legal assistance attorney should explain the advantages of a special needs trust (SNT) and how the client and his or her family can benefit from the inclusion of a SNT in any estate plan. When prepared correctly, a SNT can be a great tool for service members with a disabled dependent by providing a vehicle in which to hold assets while preserving eligibility for government Supplemental Security Income and Medicaid benefits.⁴

The purpose of this primer is to provide a legal assistance attorney with an introduction to the SNT and its possible application to service members and their families. Reading this primer will not make a legal assistance attorney competent to draft a SNT, but will give the attorney the ability to identify a client that can benefit from a SNT and advise him or her as to the benefits and possible disadvantages of a SNT. This article stresses the critical role of the legal assistance attorney in identifying the appropriate client for a SNT.

Legal assistance attorneys in the Navy and Marine Corps are not authorized to draft SNTs.⁵ The very regulation governing the providing of legal assistance states, “[d]rafting or managing special needs trusts to establish a trust for the benefit of a disabled child, parent, or other beneficiary is a complex estate planning service not normally available from legal assistance providers. However, counseling and advice regarding special needs trusts should be made

U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1754.5B, EXCEPTIONAL FAMILY MEMBER PROGRAM (14 Dec. 2005); U.S. MARINE CORPS, ORDER P1754.4A, EXCEPTIONAL FAMILY MEMBER PROGRAM (10 Apr. 1997) [hereinafter MCO P1754.A].

² Medicaid is a joint federal-state program established under 42 U.S.C § 1396 (2000).

³ For purposes of this primer, a simple will is defined as a properly executed legal instrument that passes the assets that a person has upon his death and expresses wishes for the guardianship of any minor children. A simple will does not contain any trust provisions.

⁴ See Jennifer Field, Comment, *Special Needs Trusts: Providing for Disabled Children Without Sacrificing Public Benefits*, 24 J. JUV. L. 79, 79 (2004).

⁵ The Navy/Marine Corps Legal Assistance Policy Instruction states, “Complex testamentary trusts are normally beyond the scope of the legal assistance program. A client who desires or requires this service should be advised to consult an expert estate planning professional.” U.S. DEPT. OF NAVY, JAGINST. 5802.1A, NAVY-MARINE LEGAL ASSISTANCE PROGRAM para. 7-2.b(5)(a) (26 Oct. 2005).

available.”⁶ Accordingly, once a client is identified as being able to benefit from a SNT, he or she should be advised to consult with “an expert estate planning professional.”⁷

This primer begins with an introduction to the applicable statutes and regulations governing SNTs. Next follows a discussion of how a SNT can be a valuable tool for a service member to protect the welfare of his or her dependent while ensuring the dependent’s eligibility for government assistance. Finally, the primer offers examples of clauses to include in a SNT in order to best protect the client’s wishes.

II. QUALIFYING FOR THE SPECIAL NEEDS TRUST

A. Definition of a Disability

SNTs are appropriate when a service member is faced with providing for a dependent with a qualifying disability. A dependent with a qualifying disability must be distinguished from a dependent that qualifies to participate in the Exceptional Family Member Program (EFMP). As noted above, each of the military services has its own regulations governing the implementation of its EFMP. The Marine Corps defines an exceptional family member (EFM) as “a Marine Corps family member with a condition requiring special medical, medically-related, or special education services.”⁸ For purposes of qualifying for SSI, a disability for a child is defined as “a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months.”⁹

Since there may be a situation where a service member has an adult dependent with special needs, it is important to know the appropriate definition of a qualifying disability for an adult:

⁶ *Id.* at para. 7-2b(5)(c).

⁷ *See id.*

⁸ MCO P1754.4A, *supra* note 1, at para. 3. The other services define an EFM differently. *See, e.g.*, U.S. DEPT. OF NAVY, OPNAV INST 1754.2C, EXCEPTIONAL FAMILY MEMBER (EFM) PROGRAM (3 Apr. 2007) encl. (1) para. 5 (“[An individual who] possesses a physical, emotional, developmental, or educational disability or condition requiring special medical, mental health, or educational services.”); AR 608-75, *supra* note 1, at 38 (“A family member with any physical, emotional, developmental, or intellectual disorder that requires special treatment, therapy, education, training, or counseling.”). The U.S. Air Force uses the DOD Special Medical Needs definition. AFI 40-701, *supra* note 1, at para. 1.2.1.2 (citing U.S. DEP’T OF DEFENSE, INSTR. 1315.19, AUTHORIZING SPECIAL NEEDS FAMILY MEMBERS TRAVEL OVERSEAS AT GOVERNMENT EXPENSE encl. 4 (20 Dec. 2005)).

⁹ 20 C.F.R. § 416.906 (2008).

[T]he inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, [the adult] must have a severe impairment(s) that makes [him or her] unable to do [his or her] past relevant work (see § 416.960(b)) or any other substantial gainful work that exists in the national economy.¹⁰

Comparing the definition of an EFM with the definition of an SSI qualifying disability, the average service member might assume that a dependent qualifying for the EFMP would also be deemed to have a qualifying disability. This, however, is not the case. The definition of an EFM is much broader than that of an individual with a qualifying disability. An EFM can be an individual with a food allergy or a mild learning disability, while a qualifying disability under SSI requires “marked and severe functional limitations” for a period of 12 months for a child and essentially the inability to maintain gainful employment in the case of an adult. This distinction is important. It is possible that all military dependents with a qualifying disability for the purposes of receiving SSI would be considered an EFM; while not all EFMs would qualify as being disabled for purposes of receiving SSI.

Legal assistance attorneys must understand this distinction in order to properly advise their clients. For more information on the EFM program, legal assistance attorneys should seek out local EFM staff on their base or station. Additionally, in many areas there are attorneys in the community who work very closely with special needs support groups and other organizations and can offer the special expertise the military family needs to best accomplish its goals.

Since the difference between an EFM and a dependent with a qualifying disability is critical to the SNT, one must know who makes the determination that an individual has a qualifying disability. This determination is normally made by the state in which the dependent lives.¹¹ If the state does not provide this service, the Social Security Administration (SSA) will make the determination.¹² When dealing with a client who has a dependent with a

¹⁰ *Id.* § 416.905.

¹¹ *Id.* § 416.903(a) (“State agencies make disability and blindness determinations for the Commissioner for most persons living in the State. State agencies make these disability and blindness determinations under regulations containing performance standards and other administrative requirements relating to the disability and blindness determination function.”)

¹² *Id.* § 416.903(b) (“The Social Security Administration will make disability and blindness determinations for . . . (1) Any person living in a State which is not making for the Commissioner any disability and blindness determinations or which is not making those determinations for the class of claimants to which that person belongs.”)

possible qualifying disability, the legal assistance attorney must ensure that the disability determination is made by the appropriate state or federal agency and not by a local organization or support group.¹³ Having the determination made by a non-qualified agency may waste time and effort by the service member and his or her family and cause considerable unnecessary stress to the family. Ensuring that the client's dependent has a qualifying disability is a key piece of information for the legal assistance attorney to have when providing advice on the benefits of a SNT.

B. Benefits Protected by the Special Needs Trust

Once an individual is determined to have a qualifying disability, he or she is then eligible for government assistance.¹⁴ These benefits are provided at both the federal and state levels. The main benefit provided by the federal government is SSI.¹⁵ The state usually provides benefits in the form of access to Medicaid for individuals who qualify for SSI.¹⁶ Each of these programs will be discussed in some detail below.

1. Supplemental Security Income

SSI provides monthly income for individuals with qualifying disabilities who meet certain income and asset restrictions.¹⁷ The amount of the monthly payment may vary from state to state as some states supplement the federal SSI amount.¹⁸ For example, in 2009, the amount of monthly SSI

¹³ See *id.* § 416.904 (cautioning that a disability determination made by another agency is “not binding” on SSA).

¹⁴ See generally Sharon W. Montayne & Gina DePietro, *Meeting Special Education Needs: Drafting Special Needs Trusts*, 79 PA. BAR ASS'N Q. 12 (2008) (analyzing SNTs and Third Party Education trusts in the context of structuring settlement agreements and monetary awards in special education cases).

¹⁵ See Social Security Act, 42 U.S.C. §§ 301 *et seq.* (2000).

¹⁶ For instance,

A State plan may provide for the making of determinations of disability or blindness for the purpose of determining eligibility for medical assistance under the State plan by the single State agency or its designee, and make medical assistance available to individuals whom it finds to be blind or disabled and who are determined otherwise eligible for such assistance during the period of time prior to which a final determination of disability or blindness is made by the Social Security Administration with respect to such an individual. In making such determinations, the State must apply the definitions of disability and blindness found in section 1614(a) of the Social Security Act.

See *id.* § 1396.

¹⁷ SOCIAL SECURITY ADMINISTRATION, BENEFITS FOR CHILDREN WITH DISABILITIES 5-6 (2008), available at <http://www.ssa.gov/pubs/10026.pdf>.

¹⁸ *Id.* at 4-5.

payments is \$674.00 for an eligible individual.¹⁹ This amount includes a 5.8% cost-of-living adjustment over 2008.²⁰ The amount of the cost-of-living increase for any given year is determined through a formula specified in the Social Security Act.²¹ Determining what percentage of this amount any one client may be eligible to receive depends on a myriad of factors. These factors generally concern the amount of income attributed to the disabled individual.²² A discussion on the SSA's income determination follows.

To determine if a qualified disabled individual will receive SSI, the SSA looks at his income and assets.²³ If the individual has either too much income or too many assets, he or she may not qualify for SSI.²⁴ First, one must understand what is considered income to the SSA or under the social security statutes. The SSA's definition of income is anything received "in cash or in kind that you can use to meet your needs for food and shelter. . . . In-kind income is not cash, but is actually food or shelter, or something you can use to get one of these."²⁵ There are many complicated rules for determining exactly what income can be attributed to the disabled individual.²⁶ Therefore, be aware that a disabled child's parents' income may also be attributed to the disabled child and reduce or eliminate eligibility for SSI payments.²⁷ The legal assistance attorney should also be aware of things that are not considered income. These are items that cannot be used as food or shelter.²⁸ Some examples include certain medical care and services, some social services, tax refunds, and proceeds from a loan.²⁹ Probably more important to the legal assistance client are the restrictions concerning resources.

The SSA defines resources as "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be

¹⁹ SSI Federal Payment Amounts, <http://www.ssa.gov/OACT/COLA/SSIamts.html> (last visited Mar. 11, 2009).

²⁰ *Id.*

²¹ 42 U.S.C. § 415(i) (2000).

²² *See* 20 C.F.R. § 416.413 (2008).

²³ *Id.* § 416.202.

²⁴ Montayne & DePietro, *supra* note 14, at 12.

²⁵ *See* 20 C.F.R. § 416.1102 (2008).

²⁶ *Id.* §§ 416.1101-1165.

²⁷ *Id.* § 416.1165.

²⁸ *Id.* § 416.1103.

²⁹ *Id.* Some other examples are medical care and services given free of charge or paid for directly to the provider by someone else, room and board received during medical confinement, direct payment of insurance premiums by anyone on behalf of the disabled individual, payments from the Department of Veterans Affairs resulting from unusual medical expenses, payments by credit life or credit disability insurance, and bills paid by someone else. *Id.* Therefore, the attorney should advise the client to be cautious of receiving any in-kind income, as the SSA may use it to offset the amount of disability.

used for his or her support and maintenance.”³⁰ The key test to determine if property is counted as a resource is whether the disabled individual “has the right, authority or power to liquidate the property or his or her share of the property. If a property right cannot be liquidated, the property is not considered a resource of the individual.”³¹ To qualify for SSI, the amount of resources is limited to \$2000 for an individual.³² Much like income, certain items are excluded from the definition of resources.³³ Examples of these items are: an individual’s personal residence, automobile, certain types of life insurance owned by the individual and household furnishings.³⁴ Due to the various income and resource restrictions placed upon individuals attempting to qualify for SSI, it is important that the legal assistance attorney identify issues that may impact potential clients with a qualifying disabled dependent.

2. Medicaid

Medicaid is a “joint federal-state program for disabled and elderly persons.”³⁵ Access to Medicaid is often more important to a disabled individual than receiving SSI payments. Medicaid provides payments for many medical services that may be required in the course of caring for a disabled individual.³⁶ Qualifying for Medicaid is very similar to qualifying for SSI, as there are income and resource limits placed on the individual seeking assistance. Since Medicaid is also a state program, the income and resource restrictions will vary from state to state. In Georgia, for example, the income and resource limitations are the same as the income and resource limits for SSI.³⁷ North Carolina, on the other hand, uses the same resource amount, but has a slightly higher income limit of \$903.³⁸ Due to the various limits on income and resources throughout the states, it is important for the legal assistance attorney to complete the appropriate research prior to advising clients on income and resource limits as they apply for Medicaid.

³⁰ 20 C.F.R. § 416.1201(a) (2008).

³¹ *Id.* § 416.1201(a)(1).

³² *Id.* § 416.1205(c).

³³ *Id.* §§ 416.1210–416.1218.

³⁴ *Id.* Other items included are burial plots and many payments or government benefits through other programs.

³⁵ Sterling L. Ross, *The Special Needs Trust: A New Wrinkle No More*, 36 U. MIAMI INST. ON EST. PLAN. 16, para. 1601 (2002).

³⁶ 42 U.S.C. § 1396d(a) (2000) (listing approximately 30 different services covered by Medicaid, including inpatient and outpatient services, dental, physical therapy, nurse, hospice, and community care).

³⁷ 2009 Financial Limits-All Programs, http://dch.georgia.gov/00/channel_title/0,2094,31446711_31945377,00.html (last visited Mar. 11, 2009).

³⁸ Medicaid Eligibility, <http://www.dhhs.state.nc.us/dma/medicaid/basicmedelig.pdf> (last visited Sept. 11, 2009).

3. Effects of SSI and Medicaid Restrictions with Respect to an Estate Plan

As stated above, there are strict limits to the amount of income and resources that a disabled individual can have and still be eligible for SSI and Medicaid. It appears pretty standard that a disabled individual may not have more than \$2000 in resources and still qualify for SSI and Medicaid. Accordingly, if a disabled individual inherits or gains access to a large sum of money, there could be catastrophic consequences to the health and welfare of that individual in that he or she may no longer qualify for government assistance while having access to the disqualifying resource. Accordingly, in that scenario, the individual would need to reduce his resources below the maximum threshold prior to regaining eligibility for SSI and Medicaid.

There are two ways to regain access to the programs: spend down the assets or find a vehicle to deposit the funds so that they are no longer counted as resources.³⁹ Spending down of one's assets is sometimes referred to as "voluntary impoverishment."⁴⁰ Requiring a disabled individual to spend down his or her assets can result in the individual becoming destitute and dependent upon the government for his or her care, leaving him or her with literally no money for anything more than what the government provides.⁴¹ The other method of preserving benefits without spending down the assets is to have the assets located in a vehicle that allows for some benefit to the disabled child while not granting him direct access to the funds. This vehicle is the SNT.

4. The Special Needs Trust

Access to SSI and Medicaid provides the disabled individual with not much more than the essentials for living.⁴² The programs are intended to supply the individual with enough income to maintain his or her health and support.⁴³ The programs do not, however, provide funds for entertainment or other

³⁹ Daryl L. Gordon, *Special Needs Trust*, 15 QUINNIPIAC PROB. LAW JOUR. 121, 122-23 (2000).

⁴⁰ See generally John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81 (2003) (reviewing the practice and policy behind voluntary impoverishment and proposing solutions to the controversy).

⁴¹ Field, *supra* note 4, at 79; Gordon, *supra* note 39, at 122.

⁴² See generally Chadwick Allen Harp, *Estate Planning for the Disabled Beneficiary*, 11 PROB. & PROP. 14 (1997) (highlighting financial planning issues to allow disabled beneficiaries to receive travel, entertainment, and other non-essentials).

⁴³ Field, *supra* note 4, at 79.

discretionary expenses.⁴⁴ Proper utilization of a SNT can provide for these items.⁴⁵

There are two different types of SNTs. The first type is the First Party SNT, which is established with the assets of the trust beneficiary.⁴⁶ The second type is called a Third Party SNT, which is established by someone other than the beneficiary, such as a parent or other relative.⁴⁷

a. The First Party Special Needs Trust

The First Party SNT is also referred to as a “self-settled” SNT.⁴⁸ These trusts are often established with the proceeds from a personal injury award or medical malpractice award.⁴⁹ Self-funded trusts were initially frowned upon by legislatures because of their misuse by the affluent as a means to shield their assets while letting the government pay for long-term medical care.⁵⁰ Despite its initial reticence to allowing these types of trusts, in 1993 Congress recognized that “disabled persons have financial needs beyond essential medical care” and granted two exceptions to this prohibition.⁵¹ These two exceptions are the Payback Trust and the Pooled Asset Trust.⁵² By allowing the proceeds of a settlement to be placed in a SNT, the disabled individual retains eligibility for SSI and Medicaid while retaining the ability to gain access to items not provided by the government through the use of the settlement.

A common type of First Party SNT is the Payback Trust. A Payback Trust allows an individual to place assets, such as those discussed above, in a SNT and still qualify for government benefits.⁵³ There are two main provisions for the establishment of a Payback Trust.⁵⁴ First, like all SNTs, the individual must be disabled.⁵⁵ Second, the trust must be established “for the benefit of such individual” by a parent, grandparent, legal guardian of the individual, or a

⁴⁴ *Id.* at 79-80.

⁴⁵ *Id.* at 81 (listing as some of the “luxurious” necessities a SNT can provide to a disabled child, among others, transportation, vacations, reading materials, computer equipment, companionship, experimental medical treatments, nurses, and “sophisticated diagnostic services”).

⁴⁶ *Id.* at 80.

⁴⁷ *Id.*

⁴⁸ Ross, *supra* note 35, at para. 1600.2.

⁴⁹ Field, *supra* note 4, at 87.

⁵⁰ *Id.* at 86.

⁵¹ *Id.* (quoting Clifton B. Kruse, Jr., *OBRA '93 Disability Trusts - A Status Report*, 10 PROB. & PROP. 15, 15 (1996)).

⁵² *Id.* at 87.

⁵³ *Id.*

⁵⁴ Field, *supra* note 4, at 87.

⁵⁵ *Id.* (citing 42 U.S.C. § 1382c (2000) for the federal definition of disability).

court.⁵⁶ This type of SNT is called a Payback Trust because upon the death of the individual, the state will be reimbursed from the trust corpus for the cost of the medical assistance received by the individual.⁵⁷ The Pooled Asset Trust is similar to the Payback Trust, except the trust corpus is pooled with the assets of other disabled trust beneficiaries and is usually managed by a non-profit organization.⁵⁸ Upon the death of the disabled individual, the trust corpus is either retained by the pooled trust or repayable to the state in the same manner as a Payback Trust.⁵⁹

Returning to the example of the young service member legal assistance client, there may be a situation where a First Party SNT may be appropriate. For instance, suppose that a service member's child has been injured in an accident. If the accident left the child disabled, as defined above, and the child received a settlement or monetary payout, the parents will need a vehicle to place those funds so that the disabled child can benefit from the funds without eliminating his or her eligibility for public medical benefits. The service member can use these funds and establish a First Party SNT for his or her child. This will allow the child to receive a benefit from these funds without having to deplete the settlement prior to receiving the public benefits. Using a First Person SNT in this instance provides immediate protection of the disabled child's benefits and long-term access to the settlement to supplement those benefits.

b. The Third Party Special Needs Trust

The second type of trust, the Third Party SNT, is used when trying to provide for an individual that is born with a disability or develops the disability without another's intervening action. As stated above, an individual will not be eligible for SSI or Medicaid benefits if he or she has more than a certain amount of assets.⁶⁰ Accordingly, if a disabled individual receives a gift or bequest that increases his or her assets to over the maximum allowed, he or she would no longer qualify for the benefits until the extra funds have been spent.⁶¹ This situation is avoided by establishing a Third Party SNT. A Third Party SNT is created by someone other than the disabled individual.⁶² When properly drafted, a Third Party SNT allows for disabled individuals to receive funds (either as gifts or bequests) without the fear that these funds will disqualify them from SSI and Medicaid benefits.⁶³ Since the funds used to establish these trusts never

⁵⁶ 42 U.S.C § 1396p(d)(4)(A) (2000).

⁵⁷ Field, *supra* note 4, at 87.

⁵⁸ *Id.* at 88.

⁵⁹ *See* 42 U.S.C § 1396p(d)(4)(C)(ii) (2000).

⁶⁰ *See* 20 C.F.R. § 416.1205 (2008).

⁶¹ *See id.*

⁶² Field, *supra* note 4, at 81.

⁶³ *Id.*

actually belonged to the disabled individual, they are not subject to the payback provisions of the First Party SNT discussed above. This is the most commonly used type of trust among military clients.

In the example of the service member with a qualifying disabled child, the service member could use a Third Party SNT to benefit the disabled child. By establishing a Third Party SNT, the service member creates a vehicle for gifts, bequests, or other benefits which could then assist the child without sacrificing government medical benefits. A savvy legal assistance attorney can advise his or her client on the appropriate time to establish a Third Party SNT to best serve the interests of the service member's disabled dependent.

A Third Party SNT can be created using one of two methods: an *inter vivos* trust or a testamentary trust via someone's will.⁶⁴ An *inter vivos* trust can be used to deposit gifts from many different individuals at various times during the disabled individual's life.⁶⁵ In anticipation of his or her disabled child receiving monetary gifts from various relatives, a service member may elect to establish an *inter vivos* SNT to receive these gifts. Establishing an *inter vivos* SNT can alleviate the need for others to establish a testamentary SNT for the benefit of the disabled child. For example, if an *inter vivos* trust has already been established, individuals could name this SNT as a beneficiary in their wills instead of naming the disabled child directly or attempting to establish a testamentary SNT in their own wills.⁶⁶

The testamentary SNT is more common than the *inter vivos* SNT.⁶⁷ Normally a testamentary SNT is created by an individual's will, but could also be established through a living trust upon the grantor's death.⁶⁸ Living trusts are beyond the scope of this primer and are not discussed.⁶⁹ Using a testamentary SNT, parents can establish a SNT through their wills to distribute their estate to their disabled child.⁷⁰

⁶⁴ Ross, *supra* note 35, at para. 1602.2.

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ A living trust is normally a revocable trust that allows the grantor to place property in the trust while still retaining control over those items. Once the grantor dies, the property in the trust passes pursuant to the terms of the trust and outside of the grantor's will. The primary goal of a living trust is probate avoidance. *See* Dennis M. Patrick, *Living Trusts: Snake Oil or Better Than Sliced Bread?* 27 WM. MITCHELL L. REV. 1083, 1092 (2000).

⁷⁰ Field, *supra* note 4, at 81.

As stated above, individuals can become disqualified for certain benefits if they accumulate too many assets.⁷¹ The purpose of the SNT is to supplement, rather than supplant, these benefits:

SSI and Medicaid provide the disabled with only the bare necessities needed to maintain their health and support. SNT's can provide the disabled child with the additional materials and services that the parent would have provided during their lifetime. Some "luxuries" SNT's can provide include transportation, travel vacations, entertainment SNT distributions may also provide a disabled child with medical care that Medicaid will not provide, such as . . . experimental medical treatments.⁷²

Accordingly, understanding how the SNT works is extremely important for those that could benefit from them. There does not appear to be any certain language that must be included in a SNT to make it valid.⁷³ There must be language, however, making clear that the beneficiary has no power to "direct the trust assets for his/her own support and maintenance,"⁷⁴ and the grantor's intent "that the trust provide for the supplemental needs, and not the basic support of the disabled person."⁷⁵ This results in three basic principles common to all SNTs.

First, since an SNT is comprised of funds that benefit the disabled individual, but are not directly available to the disabled child, the SNT must be irrevocable.⁷⁶ This means that once established, the terms of the SNT may not be altered and the trust assets may only be used for the reasons laid out in the instrument establishing the trust.⁷⁷ Second, there can be only one beneficiary of the trust. For an SNT to be valid, the trust can only benefit the disabled child.⁷⁸ Finally, the SNT must identify residual beneficiaries.⁷⁹ After complying with these three principles, the choice of trustee must be given considerable thought.

⁷¹ See 20 C.F.R. § 416.1205 (2008); see also Section II.B.3, *supra*.

⁷² Field, *supra* note 4, at 81 (internal citations omitted).

⁷³ See Ross, *supra* note 35, at para. 1600.1.

⁷⁴ *Id.* at para. 1602.2.

⁷⁵ Gordon, *supra* note 39, at 123.

⁷⁶ See Field, *supra* note 4, at 82 (outlining the consequences of SNT termination); Section III.B, *infra*.

⁷⁷ See Field, *supra* note 4, at 82.

⁷⁸ *Id.*

⁷⁹ *Id.*

The trustee is the individual charged with distributing the assets of the trust, and care should be taken in choosing this individual.⁸⁰ In distributing these assets, the trustee must ensure that the distributions are in keeping with the intent of the SNT and do not supplant the benefits received by the disabled individual.⁸¹ Professional trustees, such as banks or trust companies, are best suited to fill this role.⁸² Another important consideration in choosing a trustee is whether or not the trustee has a pecuniary interest in keeping the principal of the trust as large as possible.⁸³ If the trustee is a remainder beneficiary of the remaining trust funds available at the time of the disabled beneficiary's death, he or she may tend to provide fewer funds to the disabled individual in hopes that there will be more funds left at the disabled individual's death.⁸⁴

III. APPLYING THE SPECIAL NEEDS TRUST TO THE MILITARY

As stated above, in order for a disabled person to be eligible for SSI and Medicaid, the individual must meet certain requirements. He or she must have a limited income and not more than \$2000 in resources. Through service to their country, service member parents are entitled to programs which entitle their disabled children to large payments, possibly eliminating the disabled child's eligibility for government benefits. It is important for the parents of a disabled child to understand the possible ramifications that their choices in estate planning may have on their child's eligibility for SSI and Medicaid. Furthermore, proper planning can also result in a much better quality of life for the disabled child as proceeds from the SNT supplement the benefits provided by the government. Many service members are very concerned about the quality of life of their dependents, especially those dependents who are disabled. He or she may want to provide more than just "the bare necessities needed to maintain their health and support."⁸⁵ A properly drafted SNT can provide for such luxuries as field trips or vacations, tickets to a movie or sporting event, or entertainment options. It can also provide for over-the-counter medicines, experimental treatments, and even the employment of a companion for the disabled dependent.⁸⁶

In advising service members and their spouses as to the possible benefits of a SNT, it is important for the legal assistance attorney to understand some of its nuances. First, it is important to ensure that the service member

⁸⁰ *Id.* at 84.

⁸¹ Ross, *supra* note 35, at para. 1600.3.

⁸² Kristen Lewis Denzinger, *Special Needs Trusts*, 17 PROB. & PROP. 11, 14 (2003).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Field, *supra* note 4, at 81.

⁸⁶ *Id.*

understands that each state has its own laws concerning Medicaid eligibility; therefore, no single standard SNT or qualification/standard for Medicaid exists.⁸⁷ Second, since there are different means to establish a SNT, the legal assistance attorney should be able to explain the differences between a testamentary SNT and an *inter vivos* SNT. Finally, the legal assistance attorney should be able to inform his or her client of some of the practical applications of a SNT. Some important considerations are the possibility of a change in law that could affect the treatment of the trust in the future and what happens to the trust if the disabled dependent is deemed to no longer possess a qualifying disability. Both of these instances are discussed in section B, *infra*.

A. Possible Windfalls to a Disabled Dependent

In today's military, there are numerous occurrences that can result in a potential windfall payout for a disabled dependent of a service member. As stated above, this type of event could remove the disabled dependent from being eligible for SSI and Medicaid. The disabled dependent or his guardian may have to pay down the balance of these new resources until the dependent's resources are once again below the \$2000 limit.⁸⁸ More than likely this would not fall in line with the service member's intent when he or she listed that disabled dependent as a beneficiary on a life insurance policy or named him as a beneficiary in his or her will. The legal assistance attorney needs to be aware of these potentials when advising a client about the benefits of a SNT.

Simply by being on active duty, a service member provides his or her family with many possible benefits. Some of these benefits are only available in the unfortunate event of the service member's death. First, the service member's family may be entitled to a death gratuity.⁸⁹ The death gratuity is an immediate payment made to an individual of the service member's choosing upon the death of the service member.⁹⁰ The amount of the death gratuity is currently \$100,000.⁹¹ Since the service member is not required to designate only one individual to receive the full amount of the death gratuity, he or she may wish to list different members of his or her family as beneficiaries.⁹² For example, the death gratuity can be portioned out to ten different individuals in 10% increments.⁹³ A service member may wish to leave all or part of his death gratuity to a disabled dependent. A service member with a qualifying disabled

⁸⁷ For the Medicaid eligibility guidelines, see 42 C.F.R. §§ 435.400-435.843 (2008).

⁸⁸ See Field, *supra* note 4, at 86.

⁸⁹ See 10 U.S.C. § 1475 (2008).

⁹⁰ Compensation of Survivors of Active Duty U.S. Military Personnel (Jan. 1, 2008), <http://www.defenselink.mil/militarypay/benefits/2008SurvivorComp.pdf>.

⁹¹ 10 U.S.C. § 1478 (2000).

⁹² See 10 U.S.C. § 1477(a)(1) (2000).

⁹³ *Id.*

child that has established a Third Party SNT can use that SNT as a vehicle to leave a portion of this benefit to the child without interfering with the child's SSI and Medicaid benefits.

In addition to the death gratuity, a service member's dependents may receive payment under Servicemember's Group Life Insurance (SGLI). SGLI is a program of low cost life insurance for service members.⁹⁴ This service member has the option of obtaining coverage in amounts from \$50,000 to \$400,000, which can be left to different individuals on a percentage basis.⁹⁵ Once the coverage amount is selected, the service member is free to name the beneficiary who will receive the insurance payment in the event of the service member's death.⁹⁶ Similar to the death gratuity, it is easy to imagine a service member desiring to name his or her disabled dependent as a beneficiary. Although SGLI does not allow for direct payment of insurance proceeds to minors (except for minor spouses), it does allow for the proceeds to be paid to the guardian of such a dependent.⁹⁷ Without a proper SNT, the proceeds from the SGLI may be used by the guardian in a way that would eliminate the service member's dependent's eligibility for receiving SSI and Medicaid. To prevent this from occurring, the service member can list a Third Party SNT as a beneficiary for his or her SGLI. The Third Party SNT allows the service member to leave all or part of the proceeds from the SGLI policy for the support of his or her disabled child.

As stated above, receiving this large amount of money could harm the disabled dependent by disqualifying him from receiving government medical benefits. Prior to being eligible for SSI or Medicaid the dependent would have to spend down the amount received from the death gratuity until the amount of the resource is below the maximum allowed.⁹⁸ Accordingly, prior establishment of a Third Party SNT is essential to implementing the desires of the service member to take care of his or her disabled child in the event of the service member's death, while preserving the child's ability to receive SSI and Medicaid benefits.

⁹⁴ See Servicemembers' and Veterans' Group Life Insurance Handbook (rev. Aug. 2009), <http://www.insurance.va.gov/sglisite/handbook/handbook.htm>.

⁹⁵ *Id.* at App. E.

⁹⁶ *Id.* at 6.02.

⁹⁷ *Id.* at 6.04.

⁹⁸ See 20 C.F.R. § 416.1205 (2008).

B. Practical Applications

Although the SNT is very good at protecting the assets of disabled individuals while ensuring their quality of life, some clauses should be included to maintain the intent of the grantors.⁹⁹

1. Backstop Termination Clause

A SNT is usually irrevocable, either because it is self-settled or becomes irrevocable upon the death of the grantor.¹⁰⁰ This may be of concern to the grantor of a Third Party SNT, since the law and regulations governing SNTs may change after his or her death, making the trust irrevocable.¹⁰¹ A “backstop” provision can address this concern.¹⁰² The law may change in such a manner that the trust corpus is deemed to be available to the disabled child, thus endangering his or her eligibility to government assistance due to the trust corpus counting as a resource.¹⁰³ If this situation occurs, a backstop provision can preserve the disabled child’s access to SSI and Medicaid.

A backstop provision allows the trustee to use his or her discretion to terminate the trust.¹⁰⁴ If the backstop provision is used, the terminated portion of the trust is “distributed as directed in the termination-on-death provision as if the beneficiary were then deceased.”¹⁰⁵ Generally, the individual who then receives the funds should use them for the benefit of the disabled person, but he is not legally bound to do so.¹⁰⁶ The following is an example of a backstop clause:

Notwithstanding anything to the contrary contained in the other provisions of this trust, in the event that the existence of this trust has the effect of rendering the beneficiary ineligible for Supplemental Security Income (SSI), Medicaid or any other means-tested public benefits, or in the event a claim is asserted by a third party, including a public entity, against any trust assets, the trustee may (but is not required) to terminate this trust, in whole or in part.¹⁰⁷

⁹⁹ See Ross, *supra* note 35, at para. 1602.

¹⁰⁰ See Kemp C. Scales, *Practice Perspectives: Special Needs Trusts: Practical Tips for Avoiding Common Pitfalls*, 74 PA. BAR ASS’N Q. 169, 175 (2003).

¹⁰¹ Ross, *supra* note 35, at para. 1602.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Ross, *supra* note 35, at para. 1602.

¹⁰⁷ *Id.* at para. 1604.10.

2. Restoration to Capacity

There may be an instance where the disabled individual is deemed to no longer possess a qualifying disability, and thus no longer qualifies for government assistance. The trust should consider this possibility and include a clause allowing termination of the trust if the disabled individual no longer suffers from the original disability.¹⁰⁸ This can be especially true for a service member's young dependents. In cases where the beneficiary is so young, future performance may be difficult to gauge at the time of drafting.¹⁰⁹ A "restoration to capacity" clause should address how the determination that the individual no longer has a qualifying disability is made.¹¹⁰ For example, depending upon the disability, both a physician's and a psychologist's opinion that the disabled individual is "restored to capacity" may be needed prior to trust termination under this clause.¹¹¹ In this type of scenario, the beneficiary of the trust no longer has a qualifying disability. Without a qualifying disability, the individual is no longer qualified for SSI and Medicaid. Accordingly, since there are no SSI and Medicaid benefits for the SNT to supplement, the trust is terminated and the trust corpus is paid out according to the trust provisions.¹¹² A sample "restoration to capacity" clause follows:

Upon a determination of restoration to capacity, the trustee may, in the trustee's absolute discretion, deliver all or a portion of the trust estate to the beneficiary, free of trust. All costs relating to termination of the trust or distribution of assets under the foregoing provisions, including reasonable attorneys' fees, shall be a proper charge to the trust estate.¹¹³

IV. CONCLUSION

The benefits of a Special Needs Trust for service members with disabled dependents are enormous. It is important to remember that a SNT is not simply a vehicle to shield assets, but is a means to improve the quality of life for a disabled loved one.¹¹⁴ The conscientious legal assistance attorney needs a basic knowledge and understanding of the mechanics of a SNT in order to better serve his or her clients. In addition to simply being able to understand how a

¹⁰⁸ *Id.* at para. 1602.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Ross, *supra* note 35, at para. 1602.

¹¹² *Id.*

¹¹³ *Id.* at para. 1604.9.

¹¹⁴ See Field, *supra* note 4, at 81.

SNT works, he or she also needs to understand who can use a SNT and how the SNT can benefit the service member and his or her dependents.

The establishment of a SNT can provide peace of mind to the service member knowing that his or her dependent can receive benefits while still maintaining an acceptable quality of life. Not only will the SNT be able to hold assets left by the service member, but it can also provide other relatives with a place to deposit their assets for the benefits of the disabled dependent.

Given the nature of SSI and Medicaid rules, care must be taken to ensure that the SNT supplements rather than supplants the benefits provided to the disabled dependent by the government. Establishing a SNT is a complicated endeavor and should only be undertaken by a competent attorney specializing in complex estate planning who is familiar with the appropriate federal and state laws. However, the cost of having a SNT drafted by a competent attorney is vastly outweighed by the immediate benefit in knowing that a disabled dependents will be taken care of even after the parents are no longer able to care for them.

FOR THE “ROUND AND TOP OF SOVEREIGNTY”¹: BOARDING FOREIGN VESSELS AT SEA ON TERROR-RELATED INTELLIGENCE TIPS

THOMAS M. BROWN *

I. INTRODUCTION

I must go down to the seas again,
to the lonely sea and the sky,
And all I ask is a tall ship
and a star to steer her by²

John Masefield penned these famous words about the glorified age of sail, a time of inspiring freedom for the mariner.³ But today’s mariner enjoys a great deal less of the autonomy that led to such poetry. When away from his homeland, the ancient mariner braved many perils: hazardous seas, dangerous cargoes, pirates, remote medical emergencies, the necessities of harsh crew discipline, and potential hostilities in foreign ports. The master of a merchant ship today, while facing similar hazards, additionally faces “nightmarish” regulatory requirements.⁴ From complex safety regimes handed down by the International Maritime Organization⁵ to stringent environmental regulations

¹ William Shakespeare, *MacBeth*, act 4, sc. 1, referring to the monarch’s crown.

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² John E. Masefield, *Sea-Fever*, in *SALT-WATER BALLADS* 59 (1913). Mr. Masefield was Poet Laureate of Great Britain from 1930 until his death in 1967.

³ Unless noted otherwise, all references to mariners or seafarers pertain to civilians crewing cargo ships of the global maritime industry, and not those crewing warships or other public vessels.

⁴ Interview with Timothy F. Nelick, Captain, United States Merchant Marine, in Morningside, Md. (May 15, 2008). Captain Nelick is dually licensed as a Master of Vessels of Unlimited Tonnage upon Oceans, and as a Chief Engineer of vessels powered by Steam or Diesel propulsion (unlimited horsepower). He holds the highest possible licensure in both merchant marine officer competencies.

⁵ *See e.g.*, International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2 [hereinafter SOLAS].

ubiquitous among developed nations' ports,⁶ today's captain may lose more sleep over administrative burdens than over pirates plying the Strait of Malacca.⁷ However, when transiting outside of seas subject to the jurisdictional control of coastal states,⁸ the merchant mariner⁹ still enjoys that uniquely inspiring liberty, as he is protected by various customs and treaties of international law.

The 20th century saw a trend away from a principle of freedom on the high seas,¹⁰ in favor of coastal states' claims of control over particular sea areas. No longer is a ship subject exclusively to the jurisdiction of its flag-state¹¹ when at sea. Now it also may face boardings and executive enforcement by a coastal state whose waters it enters. Additionally, non-flag-state assertions of jurisdiction on the high seas have burgeoned since international recognition of certain activities that are so illicit that any nation may enforce their violation became formalized.¹² While it remains to be seen under international law whether a ship alleged to be engaged in terror-related activity may be boarded on the high seas without consent, under some circumstances the United States likely has legitimate grounds to do so. If this is the case, the principle of freedom on the high seas, whose beneficiaries include the merchant vessel and the sovereign state whose flag she¹³ flies, has experienced further encroachment.

This article explores the legal principles by which the United States could claim the authority to conduct such boarding of merchantmen in response

⁶ See e.g., 33 U.S.C. § 1251 et. seq. (2002) (Clean Water Act).

⁷ Nelick, *supra* note 4. See also Office of Naval Intelligence, *Worldwide Threat to Shipping Mariner Warning Information*, Sep. 30, 2009 (identifying eight separate attacks or boardings by pirates off of East Africa and in the Indian Ocean in one week alone).

⁸ See United Nations Convention on the Law of the Sea, arts. 2, 33(2), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. States may exert sovereign control over their territorial seas (extending 12 nautical miles out to sea) and may exercise control necessary for the enforcement of certain laws over their contiguous zone (extending 24 nautical miles out to sea). See also *infra* Part III.A (discussing jurisdiction of coastal states in more detail).

⁹ Maritime nomenclature is often misused. A merchant ship or merchantman is a commercial vessel operated by a commercial entity under the registration of a particular flag-state. See *infra* Part II.A. All of the ships flying the flag of one particular state comprise that state's "merchant marine," regardless of particular vessel ownership. A "merchant marine" is a particular nation's sea-going industry sector, while the crewmembers of merchant ships are "merchant mariners." These terms vary worldwide; e.g., the British refer to theirs as a "merchant navy."

¹⁰ See *infra* Part II.B.

¹¹ See *infra* Part II.A.

¹² See *infra* Part III.D (discussing universal proscription of, and jurisdiction over, the transport of slaves, piracy, trafficking of illegal narcotics, and unauthorized broadcasting from the high seas). Cf. *infra* Parts III.E and G (discussing the authority of the United Nations Security Council to authorize high-seas boardings by non-flag-state authorities, and high-seas-admiralty-criminal jurisdiction by non-flag states respectively).

¹³ This paper uses the female personal pronoun for ships in accordance with the U.S. NAVY STYLE GUIDE, http://www.navy.mil/tools/view_styleguide_all.asp.

to terror-related intelligence tips. It will discuss possible justifications for boarding in the following scenarios: on seas over which the United States has jurisdiction; with the consent of the master; with the consent of the flag-state; under the premise that terrorism-related activities violate *jus cogens* norms of international law, or at least the customary law of the sea; under the authority of a United Nations Security Council Resolution; and finally under the auspices of anticipatory self-defense.¹⁴ This article will also explore various methods for asserting extraterritorial jurisdiction over persons, and the implication of such an assertion of jurisdiction on the flag-state's sovereignty in the context of non-consensual boardings.¹⁵

The tension between the principle of freedom of the seas for the sake of international maritime commerce and modern nations' interests in self-protection from seaborne threats is not easily resolved. On the one hand, global markets place tremendous pressure on governments to allow fast and inexpensive global supply chains to move products faster and less expensively, especially over high-volume-maritime links. Ever larger ships¹⁶ create ever larger pressures on governments to keep port entrances smooth and expeditious. With tens of thousands of tons of cargo, often perishable or whose delivery is extremely time-sensitive, standing to be delayed,¹⁷ the pressure on lawmakers, customs inspectors, and coast guard officials to prevent the loss of even an hour is tremendous.¹⁸ On the other hand, the threat of terrorist attacks from the sea,

¹⁴ The White House, *The National Security Strategy of the United States*, Sep. 20, 2002, revised 2005, available at <http://www.whitehouse.gov/nsc/nss.pdf> (stating that the United States will act preemptively in the face of a developing threat of terrorism attack against the United States). When this paper refers to the *Bush Doctrine*, it intends only to refer to this narrow aspect of preemptive force to counter terror-related threats, and not its other aspects.

¹⁵ See *infra* Part III.G (discussing admiralty criminal jurisdiction).

¹⁶ E.g., Maersk Line operates the "PS" class of container ships, the first of which is *M/V Emma Maersk*, with a capacity of 11,000 twenty-foot equivalent containers (or 5,500 over-the-road trucks full of cargo). Maersk Line, Vessels, http://www.maerskline.com/link/?page=brochure&path=/our_services/vessels.

¹⁷ With modern reliance on "just-in-time" logistics principles in the manufacturing process, even a few days' disruption of a commercial liner could cripple a manufacturing sector. These logistics principles reduce manufacturing overhead by eliminating the costs of maintaining a warehouse stock. The system relies on containers arriving with the needed item, e.g., clutch plates for clutch boxes being built, no more than hours before the item is to be assembled with its whole. So quite literally factories would come to a complete halt if a ship were significantly delayed. If a factory produces subcomponents for another factory also relying on just-in-time logistics principles, e.g., clutch boxes for trucks being built, there would be a ripple effect. Cf. Paul Nyhan, *Longshoremen Strike or Lockout Could Stagger Nation's Economy*, SEATTLE POST-INTELLIGENCER, June 10, 2002, available at http://seattlepi.nwsource.com/business/73906_longshore10.shtml.

¹⁸ In the U.S., this pressure has been used positively by U.S. Customs under its Customs-Trade Partnership Against Terrorism (C-TPAT) program, giving favored, faster processing of cargo for commercial participants voluntarily self-enforcing certain security measures. See C-TPAT Overview, http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/what_ctpat/ctpat_overview.xml.

or the use of maritime transportation in support of a terrorism plot, is certainly real. One group of experts has concluded that “building and detonating a radiological bomb or commandeering ships and using them as weapons to attack key port-cities, straits or waterways are well within the capability of Al-Qaeda.”¹⁹ The nature of ships, maritime cargoes, and mariners has them constantly moving across international borders, and thus leaves this vast sector ripe for terrorism plots aimed at being as spectacular as, or more so than, those of September 11, 2001. Because of this tension, developed nations’ maritime counterterrorism strategies may come to rely heavily on intelligence tips,²⁰ leading to high-seas boardings of threatening ships, as opposed to a constricting overall security posture that slows all maritime commerce.²¹

II. FLAG-STATES, TERRITORIALITY & NATIONALITY

A. Steel, Soil and “Nationality”

Commercial seafaring is an ancient profession.²² From its *modus operandi* in an extraterritorial domain, it has instigated some of international law’s most significant developments.²³ Central to many of these developments

Cf. 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 2-28 (Practitioner Treatise 4th ed. 2006) [hereinafter Schoenbaum].

¹⁹ MICHAEL RICHARDSON, INSTITUTE OF SOUTHEAST ASIAN STUDIES, A TIME BOMB FOR GLOBAL TRADE, MARITIME-RELATED TERRORISM IN AN AGE OF WEAPONS OF MASS DESTRUCTION 32 (2004) [hereinafter A TIME BOMB FOR GLOBAL TRADE].

²⁰ For an example of such reliance upon maritime intelligence threat reporting, see Testimony of Rear Admiral Richard B. Porterfield, U.S. Navy, *Fiscal 2005 Budget: Defense Strategic Programs*, April 7, 2004, before the Senate Armed Services Strategic Sub-Committee, 2004 WL 782109 (F.D.C.H.) (“the Office of Naval Intelligence (ONI) is heavily engaged on a daily basis providing critical maritime intelligence to support the multi-agency Homeland Security effort, focusing its maritime shipping, cargo and proliferation expertise on denying terrorists the use of the seas. [It has] established a 24-hour a day, seven day a week, *National Maritime Watch* in direct support of Northern Command’s mission to ensure the maritime homeland defense of the U.S. Each day, we report on vessels of interest en route U.S. ports, *identifying those that pose a potential national security threat.*” (emphases added)).

²¹ *E.g.*, the U.S. Customs and Border Protection commissioned program entitled “Container Security Initiative,” available at http://www.cbp.gov/xp/cgov/border_security/international_activities/csi/, is designed to identify a relatively small percentage of higher-risk shipping containers for inspection in their foreign port of origin, so that the masses of unsuspecting containers can move uninhibited. *Noted in A TIME BOMB FOR GLOBAL TRADE, supra* note 19, at 75.

²² Seafaring competes with many other professions for the claim of being “second oldest,” *e.g.*, spying, politics, and lawyering. Whether it is oldest, it certainly is old. Boat models estimated to be 11,000 years old have been excavated from the banks of the Nile River. RICHARD WOODMAN, *THE HISTORY OF THE SHIP* 12 (Lyons Press 1997).

²³ *E.g.*, The spread of maritime commerce throughout the Mediterranean region brought with it principles of commercial comity that matured into early maritime laws, *e.g.*, the Rhodian law, as recorded in Justinian’s Digest. GEORGE G. WILSON, *HANDBOOK OF INTERNATIONAL LAW* 5 (3rd ed. 1939). Also, no discourse on the evolution of modern International Law is complete without

has been the extent to which a ship carried with it the sovereign protections of its “crown,” or home state, against attempted exercises of power by a foreign crown. This tension of sovereignties is at the heart of the issue of whether or not a state may stop a foreign-flagged ship at sea based on intelligence threat reporting.

Today, a merchant vessel is granted the “nationality” of the state whose flag she flies.²⁴ “Nationality” is a legal term of art defining the relationship between a vessel and its flag-state. Despite long-standing concern that use of the term would cause confusion with the distinct meaning of “nationality” as applied to natural persons,²⁵ it remained in widespread use and was ultimately incorporated into the 1958 High Seas Convention²⁶ and later the U.N. Convention on the Law of the Sea (UNCLOS)²⁷ as well.

In the context of registered vessels, their “nationality” means that the granting state generally has exclusive jurisdiction over the vessel on the high seas.²⁸ This “flag state”²⁹ is obligated to issue a registration, ensure its ships

reference to the case of the *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18 [hereinafter *Lotus*], and its support for a presumption of state freedom (i.e., positivism). See generally, Schoenbaum, *supra* note 18, § 1-2 to § 1-4, and LORI F. DAMROSCH ET AL., INTERNATIONAL LAW, CASES AND MATERIALS xxix (4th ed. 2001) for more in-depth discussion of the development of ancient and medieval maritime mercantile laws.

²⁴ UNCLOS, *supra* note 8, art. 91(1) (“Ships have the nationality of the State whose flag they are entitled to fly”; also, requiring a “genuine link between the State and the ship”). See Wilson, *supra* note 23, 175-183 (analyzing the history of the “genuine link” requirement, and its relatively low modern imposition on flag states). See also, H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L. J. 139 (1996), at 140 (noting that a state’s right to grant nationality to vessels is a premise of the principle of freedom, discussed *infra* Part II.B); Schoenbaum, *supra* note 18, at § 2-21, n.1 (noting that the use of the term “nationality” applied to vessels is confusing compared to natural persons).

²⁵ LOUIS B. SOHN & KRISTEN GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 1-2 (1984), citing debates over this terminology during the 1951 gathering of the International Law Commission.

²⁶ Convention on the High Seas, Sep. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200 (1958), art. 5 [hereinafter High Seas Convention].

²⁷ UNCLOS, *supra* note 8, art. 91(1).

²⁸ UNCLOS, *supra* note 8, art. 92(1) (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for [in this or other treaties], shall be subject to its exclusive jurisdiction on the high seas.” (emphasis added)). See also High Seas Convention, *supra* note 26, at art. 6. Cf. 44B AM. JUR. 2D INT’L LAW § 84. The narrow “exceptional cases” to which this provision alludes are UNCLOS-codified violations of the “universality principle” of international law, discussed *infra* Part III.D. See Anderson, *supra* note 24, at 140. Flag-state jurisdiction over its registered vessels is sometimes described as flowing from the nationality principle of international law, Schoenbaum, *supra* note 18, at § 3-12, and sometimes described as flowing from the territorial principle, but it more accurately exists as an independent basis of jurisdiction, that is, from the nature of ships of sea. See *infra* note 42 and accompanying text.

²⁹ The term “flag state” is used to describe a vessel’s state of nationality, which is also its state of registry. UNCLOS, *supra* note 8, at art. 82. Cf. Schoenbaum, *supra* note 18, at n§ 2-21 n.1.

comply with international safety-at-sea regimes,³⁰ and most significantly for present purposes, exercise sovereign jurisdiction over the ship wherever it travels in the world.³¹ In the case of incidents of navigation on the high seas, especially collisions, only the flag state may order an arrest or detention of one of its vessels.³² The developed corollary of international recognition of flag-state sovereignty is the principle that “stateless vessels,” those not registered by any sovereign nation, enjoy no protection from any state’s actions on the high seas.³³

The more one likens the steel deck of a ship to the flag-state’s soil, the more one is inclined to see this territorial principle as prohibiting foreign sovereigns from boarding a ship. When discussing the jurisdictional meaning of vessel “nationality,” the scholarly and judicial writings of international and admiralty law are not in full agreement about the extent to which a ship carrying a flag-state’s nationality is like the territorial soil of that state. The characterization of ships as “territory” of their state of nationality dramatically affects all subsequent analysis of foreign-boarding justifications. According to the principle under international law of territorial sovereignty, a state may not perform sovereign acts in the territory of another state without that other state’s consent.³⁴

One can see that lexical difficulty arises not only from the fact that a ship’s “nationality” does not make it subject to principles of international law related to state jurisdiction over national *citizens*.³⁵ It arises also from the oddity

Obviously, its use is derived from the maritime practice of displaying the flag of the state of nationality, the “ensign,” while underway.

³⁰ SOLAS, *supra* note 5.

³¹ UNCLOS, *supra* note 8, at art. 94 (Duties of the Flag State).

³² *Id.* at art. 97, para. 3 (“No arrest or detention of the ship... shall be ordered by any authorities other than those of the flag State”). See also Schoenbaum, *supra* note 18, at § 2-18.

³³ See Wilson, *supra* note 23, at 191. Cf. 46 U.S.C. App. § 1903(c)(1)(A) and (2) (2000) and U.S. v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) (“Restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels. Vessels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas” (footnote omitted)).

³⁴ See *Lotus*, *supra* note 23 (“the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.”). Chief Justice Marshall also famously stated in *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812), that “jurisdiction of the nation within its own territory is necessarily exclusive and absolute... Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty.” See also PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 109 (7th ed. 1997) [hereinafter *Akehurst’s*].

³⁵ This word-concept fallacy of relating a ship’s “nationality” to the “nationality principle” of international law is prevalent. See, e.g., Nathaniel Kunkle, *The Internal Affairs Rule and the*

that the jurisdictional meaning of ships' "nationality" refers to their varying, metaphoric relationship to *territorial* principles of international law. The concept of "nationality" vis-à-vis ships is a unique concept in international law,³⁶ and any comparison to territorial principles, while helpful, is a relation of analogy only. For example, in the context of determining the proper "country of origin" labeling for fish produce, the U.S. Court of International Trade has called a ship on the high seas "foreign territory, functionally a floating island of the country to which [it] belongs."³⁷ Outside of this narrow context, this characterization is all too common.³⁸ That the "floating island" metaphor is only analogically accurate in a narrow context is obvious upon closer examination. Ships as "floating islands" do not carry with them their own belt of surrounding territorial seas, contiguous zone, or an Exclusive Economic Zone.³⁹ Likewise, in the United States one does not obtain birthright citizenship based on birth aboard a U.S.-flagged "floating island."⁴⁰

Applicability of U.S. Law to Visiting Foreign Ships, 32 BROOKLYN J. OF INT'L L. 635, at 638-9 ("Vessels, [unlike the port state's territorial jurisdiction], are bound by the rules and regulations of their flag state through the jurisdictional principle of nationality," (citing REST. (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (recognizing prescriptive jurisdiction over "nationals" who are abroad)).

³⁶ See REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, § 402 cmt. h. (regarding regulation of activities aboard vessels, "The application of law to activities on board a state's vessels, aircraft, or spacecraft has sometimes been supported as an extension of the territoriality principle but is *better seen as an independent basis of jurisdiction.*" (emphasis added)).

³⁷ *Koru North America v. United States*, 12 C.I.T. 1120, 1122 (Ct. Int'l Trade 1988) (internal citations omitted).

³⁸ See, e.g., Kunkle, *supra* note 35, at n.30 (stating that a ship is "a floating extension of its flag state's territory," and that "a ship, which bears a nation's flag, is to be treated as part of the territory of that nation. A ship is a kind of floating island." (quoting *The Queen v. Anderson*, [1868] L.R. 1 C.C.R. 161, 163 (U.K.) (Blackburn, J.))).

³⁹ See *infra* Part III.A.

⁴⁰ The general rule is that a person is subject to the jurisdiction of the United States for purposes of section 1 of the 14th Amendment ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside") if his or her birth occurs in territory over which the United States is sovereign. See *Matter of Cantu*, 17 I. & N. Dec. 190, Interim Decision (BIA) 2748, 1978 WL 36395. But the child born aboard a U.S.-flagged vessel in foreign territorial waters or on the High Seas is not thereby guaranteed U.S. citizenship. *Lam Mow v. Nagle*, 24 F. 2d 316 (9th Cir. 1928). The *Nagle* court singularly took up this issue of whether a U.S. flag ship is "territory" for the purposes of birthright citizenship. In answering in the negative, the court stated, "[u]ndoubtedly petitioner's theory that a merchant ship is to be considered a part of the territory of the country under whose flag she sails finds a measure of support in statements made in some of the decided cases and in texts upon international law. But no one of the decisions brought to our attention involved the precise question here presented, and the general statement, or its equivalent, that a vessel upon the high seas is deemed to be a part of the territory of the nation whose flag she flies, must be understood as having a qualified or figurative meaning" (emphasis added).

The Prohibition Era provides another exhibit of the metaphoric relationship of ships to their flag-state's territory. The Supreme Court found itself considering whether a U.S.-flagged vessel was "territory" for the purposes of the 18th Amendment to the U.S. Constitution,⁴¹ which prohibited the sale or transportation of intoxicating liquors to or from "territory subject to the jurisdiction" of the United States.⁴² It answered in the negative, stating plainly, "that a merchant ship is a part of the territory of the country whose flag she flies . . . as has been aptly observed, is a figure of speech, a metaphor."⁴³ The Court also noted, in discussing the power of the coastal state over foreign vessels within its territorial waters,⁴⁴ that it "is a fiction" to call such a ship "part of the territory of the country whose flag she carries."⁴⁵

United States assertion of criminal jurisdiction aboard U.S.-flagged ships overseas offers a final example.⁴⁶ The Supreme Court has noted that such jurisdiction is not an application of extraterritorial jurisdiction, because a ship, "for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is *deemed* to be a part of the territory of that sovereignty."⁴⁷

It is thus apparent that a ship is only the "territory" of its flag-state in a figurative and contextually specific sense. The steel deck is not territory *per se*

⁴¹ U.S. CONST. amend. XVIII, § 1.

⁴² *Cunard S.S. Co. v. Mellon*, 262 U.S. 100 (1923).

⁴³ *Id.* at 122 (citing *Scharrenberg v. Dollar S.S. Co.*, 245 U. S. 122, 127 (1917) ("Equally unallowable is the contention that a ship of American registry engaged in foreign commerce is a part of the territory of the United States in such a sense that men employed on it can be said to be laboring 'in the United States' or 'performing labor in this country.' It is, of course, true that for the purposes of jurisdiction a ship, even on the high seas, is often said to be a part of the territory of the nation whose flag it flies. But in the physical sense this expression is obviously figurative"), and *In re Ross*, 140 U. S. 453, 464 (1891) (a ship's deck is not territory of the United States for purposes of raising a defendant's right to a jury trial before a consular officer)).

⁴⁴ See *infra* Part III.A.

⁴⁵ *Cunard S.S.*, 262 U.S. at 124.

⁴⁶ See *infra* Part III.G. for a more detailed discussion of admiralty criminal jurisdiction.

⁴⁷ *U.S. v. Flores*, 289 U.S. 137, 156 (1933) (emphases added). The court based this "qualification" of the "territorial principle" on Secretary of State Daniel Webster's correspondence with Lord Ashburton, where he said "enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." 6 WEBSTER'S WORKS, 306, 307. See also *United States v. Newball*, 524 F.Supp. 715 (D.C.N.Y. 1981) (citing *Flores* for the proposition that "Under the *nationality principle* the law of the flag a ship is entitled to fly applies to crimes committed on board." (emphasis added)). This provides an example of the same issue, criminal jurisdiction aboard ships, being described in both territoriality and nationality language.

of the flag state. It is a steel deck, the jurisdiction over which has only an analogical relationship to traditional territorial principles of international law. The merchant ship carries sovereign protection from interference in its operations not because it is purely a piece of its flag-state's sovereign soil, then, but because of the unique international law principle of vessel nationality.

One final point of scholarly confusion persists around the agency relationship of a ship to its flag-state. Several authors may have confused the vessel-and-flag-state relationship with that of agent and principle.⁴⁸ This misunderstanding seems to have bolstered the erroneous conclusions about the supposed limitations on a master's plenary authority to consent to boardings of his or her vessel.⁴⁹ A merchant ship generally does not sail for its flag-state,⁵⁰ but enjoys the protections of its flag-state all the same. But regardless if the boarded vessel is private or public,⁵¹ a state whose flagged vessel is forcibly boarded without consent could construe the boarding as a justification for war.⁵²

B. The Principle of Freedom

The principle of freedom of the seas, or the "principle of freedom,"⁵³ has been called the "fundamental principle of the law of the seas."⁵⁴ It rests upon the ideal of Hugo Grotius's famous work, *Mare Liberum*, itself built on the concept of "commonage," which maintains that the seas belong to everyone or to no one.⁵⁵ That all states enjoy freedom of the seas carries with it the corollary

⁴⁸ See, e.g., Sandra L. Hodgkins et al., *Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap*, 22 AM. U. INT'L L. REV. 583 (2007); Ian P. Berry, Note: *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299 (2004); and David G. Wilson, *Interdiction on the High Seas: The Role and Authority of a Master in the Boarding and Searching of His Ship by Foreign Warship*, 55 NAVAL L. REV. 157 (2008).

⁴⁹ See *infra* Part III.B.

⁵⁰ With the possible exception of states with a publicly owned merchant fleet. See *infra* text accompanying note 125 for a more detailed discussion of nationalized shipping lines.

⁵¹ See *infra* Part II.B discussing the principle of freedom. The state is "offended" by an unjustified boarding by a foreign power not because the ship's right to freedom is violated, but because the state's right to openly use the seas by its registered ships is offended.

⁵² E.g., in the "Arrow War" or Second Opium War, Great Britain's case for war was ostensibly made out by China's boarding of the Chinese-owned but British-flagged ship *Arrow* on October 8, 1856. The Chinese were seeking out a wanted pirate, but the indignity to the flag was all Britain needed to commence hostilities. DAVID CURTIS WRIGHT, *THE HISTORY OF CHINA* 106 (2001).

⁵³ Damrosch et al., *supra* note 23, at 1389.

⁵⁴ *Id.*

⁵⁵ *Id.*

that no state is free to exclude others from their use.⁵⁶ Only in the modern era has Grotius's view faced significant exceptions beyond those of the laws of war.

Today, the customary law of the sea's principle of freedom is embodied in the U.N. Convention on the Law of the Seas (UNCLOS), which states that the "high seas are open to all States, whether coastal or land-locked."⁵⁷ This freedom extends first and foremost to the right of navigation.⁵⁸ The Convention, now generally accepted by the United States as an expression of binding customary international law,⁵⁹ further creates an absolute bar to subjecting the high seas to any state's sovereignty.⁶⁰ The only stated limitations on high seas freedom within the UNCLOS Articles on High Seas Freedom are the ambiguous statement that they shall be exercised with "due regard for the interests of other States in their exercise of the freedom of the high seas,"⁶¹ and the mandate that the high seas are reserved for peaceful purposes.⁶²

From this principle of freedom follows the conclusion that absent an exception recognized by international law, no state other than a vessel's flag-state has the jurisdictional authority to conduct a non-consensual boarding and search of that vessel on the high seas.⁶³ For the U.S. Government to board a foreign-flagged ship, it would need to receive consent or fit the ship's activities within a recognized exception to the principle of freedom. Indeed, the very phrase "principle of freedom" carries with it an additional political cost for an Administration that seeks to justify a non-consensual, high-seas boarding.

⁵⁶ Louis Henkin, *Changing Law for the Changing Seas*, in *USES OF THE SEA* 69, 74 (Guillion ed. 1968). That the U.S. Supreme Court early adopted this view of the law of the sea is evident in *The Marianna Flora*, 24 U.S. 1, 43 (1826) ("Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriate to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there.").

⁵⁷ UNCLOS, *supra* note 8, at art. 87, para. 1.

⁵⁸ UNCLOS, *supra* note 8, at art. 90 adds to the force of this navigational freedom: "Every State, whether coastal or land-locked, has the right to sail ships under its flag on the high seas." Art. 87(1) also recognizes other freedoms, namely, of overflight, to lay submarine cables and pipelines, to construct certain artificial islands, to fish, and to conduct scientific research.

⁵⁹ See *infra*, Part III.A, and note 67, for detailed discussion of U.S. acceptance of most terms of the UNCLOS as binding customary international law.

⁶⁰ UNCLOS, *supra* note 8, at art. 89 ("No State may validly purport to subject any part of the high seas to its sovereignty").

⁶¹ *Id.* at art. 87(2). See also Schoenbaum, *supra* note 18, at § 2-18.

⁶² UNCLOS, *supra* note 8, at art. 88 ("The high seas shall be reserved for peaceful purposes."). This limitation does not apply to security or defensive purposes, however. Schoenbaum, *supra* note 18, at § 2-18, citing 4 Whiteman, *Digest Int'l L.* 523-42 (1965) (discussing the 1962 quarantine of Cuba by United States naval forces).

⁶³ UNCLOS, *supra* note 8, at art. 92.

III. EXCEPTIONS TO THE PRINCIPLE OF FREEDOM

The further out to sea an approaching vessel is when the U.S. Government receives and decides to act upon intelligence threat reporting, the less permissive are the legal bases which could justify a boarding under an exception to the principle of freedom. As the vessel approaches the U.S. coast, she will enter U.S. territorial jurisdiction. Territorial jurisdiction at sea does not displace the jurisdiction of the flag-state, but exists simultaneously with it.⁶⁴ This section explores exceptions⁶⁵ to the law of the sea's principle of freedom that exist under the UNCLOS jurisdictional regime.

A. Near-plenary Boarding Authority Within 24 Nautical Miles

The customary law of the sea, as articulated in UNCLOS, recognizes several zones of the sea where coastal states may exert jurisdiction, a primary exception to the law of the sea's general principle of freedom. The U.S. Government's authority to board a merchant ship that it believes poses a terror-related threat is at its height when such a ship is within one of these sea zones.

While the United States was a major player at, and signatory of, the United Nations Convention on the Law of the Sea, it did not ratify, and has still not acceded⁶⁶ to, the Convention.⁶⁷ However, by agreement and consistent practice, the United States has accepted UNCLOS as binding customary law,

⁶⁴ This jurisdiction does not displace the jurisdiction of the flag-state, but can exist simultaneously with it. See *supra* Part II.A (discussing flag-state sovereignty) and *infra* Part III.G, especially note 218 (discussing dual criminal jurisdiction of the flag state and the coastal state when within territorial seas).

⁶⁵ The two forms of boarding consent described in this part, that of the master and that of the flag-state, are not exceptions to the principle of freedom, strictly speaking. Instead, they are voluntary waivers of any claims that could derive from interference with the international right of freedom of navigation. However, they are included under this Part for the sake of conceptual simplicity.

⁶⁶ Accession is a formal act by which a state becomes a party to a treaty already in force because of its having been ratified by the requisite number of state parties. Damrosch et al., *supra* note 23, at 475, citing

Vienna Convention on the Law of Treaties, art. 15, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*]. Because the UNCLOS has already been ratified, it is no longer possible for the U.S. to "ratify" the treaty, but only to accede to it (the net outcome being the same in either case).

⁶⁷ The United States did announce, following significant changes to portions of the Convention it originally found objectionable, that it would accede to UNCLOS as amended. Damrosch et al., *supra* note 23, at 1389. President Clinton requested the consent of the Senate for U.S. accession, as has President George W. Bush since, but the Senate has not given its consent. *President's Statement on Advancing U.S. Interests in the World's Oceans*, 2007 WL 1419102 (May 15, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html>. The Senate Foreign Relations Committee voted as recently as October 31, 2007 to send the treaty to the floor for a vote, but this has yet to occur. Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, Reuters, Oct. 31, 2007.

except for its provisions on deep sea-bed mining.⁶⁸ Two key, and now uncontroversial, terms⁶⁹ of UNCLOS grant coastal states a substantial amount of power to act upon foreign-flagged ships in the waters approaching their shores. These modern changes to the customary law of the sea represent the deepest, most significant exceptions to its principle of freedom, whereby a ship's flag-state would otherwise possess exclusive jurisdiction over it.

1. Territorial Seas

The first zone seaward of a state's coast in which it may exert jurisdiction over a foreign-flagged ship is its "territorial sea."⁷⁰ (It goes without saying that a state also has complete territorial jurisdiction over its "internal waters," which are, generally, waterways that are inland from the coast.)⁷¹ Coastal states may claim territorial seas out to 12 nautical miles from the coast.⁷² Within this zone the coastal state's jurisdiction is nearly plenary, and generally

⁶⁸ REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, Part V, Introductory Note, *citing* Case Concerning Delimitation of the Maritime Boundary of the Gulf of Maine, 1984 I.C.J. Rep. 246, at 294. The sea-bed mining provisions are those which were amended in the 1994 Agreement, discussed *infra* note 142, causing President Clinton to seek accession, *supra* note 67. *See also* Sarai v. Rio Tinto PLC, 456 F.3d 1069 (9th Cir. 2006) (noting that ratification of UNCLOS by 149 nations was sufficient for its terms to constitute a codification of customary international law).

⁶⁹ The U.S. opposed territorial claims over seas beyond 3 nautical miles from shore until 1988, when President Reagan declared an assumption of territorial jurisdiction out to 12 nautical miles from U.S. coasts. The White House, *Presidential Proclamation on the Territorial Sea of the United States*, Dec. 27, 1988, 28 I.L.M. 284 (1989).

⁷⁰ UNCLOS, *supra* note 8, at art. 2 ("The sovereignty of a coastal State extends, beyond its land territory and internal waters...to an adjacent belt of sea, described as the territorial sea"), and art. 3 ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention"). *See generally* Bernard G. Heinen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L.R. 597, 603 (1959), for the fascinating and controversial history of the development of this exception to the principle of freedom. The first limitations to maritime freedom came in the form of small pockets of seas within the range of a coastal state's cannons, the "cannon-shot rule." It was not a continuous belt of seas as today's law of the sea allows, and was for purely defensive purposes, so derived from the longstanding law of war exception to maritime freedom. The U.S. articulated this position in an effort to assert its neutrality in the war between France and Great Britain in 1793, stating that those states should respect U.S. neutrality out to "the utmost range of a cannon ball, usually stated at one sea league." *See* Damrosch et al., *supra* note 23, at 1393, *citing* 1 Moore, Digest of Int'l Law, 702–703 (1906).

⁷¹ UNCLOS, *supra* note 8, at art. 8. As baseline calculations are at times complex and controversial, this paper refers, for simplicity's sake, to sea zones extending from a coastal state's *coast* and not its *baselines*. *Cf.* UNCLOS, *supra* note 8, at arts. 5–16, and *The Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (disputing delimitation of territorial seas based on the laying down of baselines at the mouths of deep fjords).

⁷² One nautical mile is equal to 1.15 statute miles, so territorial seas may extend to a maximum of 13.8 statute miles from a coastal state's "baseline." National Imagery and Mapping Agency, *American Practical Navigator (Bowditch)*, Pub. No. 9 § 2203 (1995 ed.).

overrides the sovereign interests of the vessel's flag-state.⁷³ The term "territorial" as applied to seas is and is not meant in its literal sense, as the grant of dominion by international treaties over this territory came with limiting strings attached, specifically, that states could not preclude certain vessel transits.⁷⁴ However, a coastal state's power over its territorial seas under the customary law of the sea is unquestionably sufficient to justify the U.S. Government's boarding of a foreign-flagged ship in this zone based on terrorism-related intelligence threat reporting.⁷⁵

2. Contiguous Zone

The second offshore zone in which a coastal state may exert jurisdiction⁷⁶ over a foreign-flagged ship exists, for limited prevention and enforcement purposes, within a coastal state's "contiguous zone."⁷⁷ This zone is geographically defined as a belt of seas contiguous to the outer limit of the

⁷³ See *infra* Part III.G, especially note 204 (discussing dual criminal jurisdiction of the flag state and the coastal state when within territorial seas).

⁷⁴ This broad power is subject to the limitations imposed by the rights of transit and innocent passage. See UNCLOS, *supra* note 8, at arts. 37 and 38 (generally permitting transit passage as a right through straits connecting one part of the high seas or exclusive economic zone to another); and arts. 17 and 18 (permitting transit through territorial seas for completely innocent purposes), which terrorist-related activity is not, so this exception is inapplicable for present purposes. Art. 19 defines innocent passage, and gives a list of non-innocent activities, which may or may not be an exclusive list (the text is ambiguous on this point). For discussion that transportation of WMD does not neatly fit within any of the listed activities in art. 19, see Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, Spring 2005. But see *infra* text accompanying note 83 and following.

⁷⁵ Besides international legal concerns, however, domestic (i.e., municipal) concerns remain, e.g., whether a search and seizure would violate the 4th Amendment. These issues are discussed *infra*, Part III.G.

⁷⁶ Use of the word "jurisdiction" with respect to the contiguous zones is often confused. One source seems reluctant to use the word at all in this context, using "control" or "national authority" instead. 44B AM. JUR. 2D *International Law* § 76. As the contiguous zone is not territory of the coastal state, but meant to allow coastal states to prevent the violation of certain laws within their territory (including within the territorial seas), and assertion of power within this zone would be an exercise of *extraterritorial jurisdiction*. REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, at § 511, and Schoenbaum, *supra* note 18, at § 2-15, use the term "jurisdiction" in describing the authority of the coastal state over the contiguous zone. JOHN A. EDGINTON, ET AL., BENEDICT ON ADMIRALTY § 112[5] (2001) lists the contiguous zone as one subject to the "territorial" jurisdiction of the United States, which lacks the important qualification that such jurisdiction exists only in accordance with the "objective territoriality" principle. See *infra*, Part III.G., especially text accompanying note 213.

⁷⁷ UNCLOS, *supra* note 8, at art. 33, para. 2 (the "contiguous zone may not extend beyond 24 nautical miles from the baselines..."). See also Presidential Proclamation 7219, *Contiguous Zone of the United States by the President of the United States of America*, Sep. 2, 1999, 64 F.R. 48701 (1999) (formally extending the United States' declared contiguous zone to the UNCLOS-permitted 24 nautical miles).

territorial sea, and extending an additional 12 nautical miles seaward.⁷⁸ Unlike the territorial seas, where a coastal state has territorial jurisdiction, the Convention grants only limited extraterritorial jurisdictional authority within the contiguous zone.⁷⁹ A coastal state may exercise control within this zone when necessary to prevent or punish “infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”⁸⁰ Following its extension of the territorial seas from three nautical miles out to 12,⁸¹ the United States has claimed a contiguous zone out to the allowable 24 miles.⁸²

At least one scholar has argued that a coastal state would violate international law by conducting a non-consensual counterterrorism interdiction of a foreign vessel in its contiguous zone, simply because “transport of WMD⁸³ does not readily fall within any of the four categories listed in Article 33 [on the Contiguous Zone].”⁸⁴ While the four categories permitting the exercise of control over the contiguous zone (i.e., customs, fiscal, immigration, or sanitary laws and regulations) were not drafted with WMD shipments and counterterrorism boardings in mind,⁸⁵ the conclusion does not hold. WMD

⁷⁸ In other words, a coastal state can claim jurisdiction, for certain purposes, over an area extending 24 nautical miles from its coast by adding the 12 nautical miles of contiguous zone to the 12 nautical miles of territorial sea that it may claim.

⁷⁹ UNCLOS, *supra* note 8, at art. 33, paras. 1(a) and (b).

⁸⁰ *Id.* Note here that the potential territorial effect justifies the exercise of extraterritorial jurisdiction. See International Law Commission commentary to this article’s equivalent in the 1958 Convention on the Territorial Sea and Contiguous Zone, art. 23, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (“International Law accords States the right to exercise preventive or protective control for certain purposes over a belt of the high seas contiguous to their territorial sea. It is, of course, understood that this power of control does not change the legal status of the waters over which it is exercised. These waters are and remain a part of the high seas and are not subject to the sovereignty of the coastal State, which can exercise over them only such rights as are conferred on it by the present draft or are derived from international treaties.”). Cf. *Church v. Hubbard*, 6 U.S. 187 (1804) (a state may exercise its power outside of its territory to prevent injury).

⁸¹ See *Presidential Proclamation on the Territorial Sea of the United States*, *supra* note 69.

⁸² *Contiguous Zone of the United States by the President of the United States*, *supra* note 77, implemented by 33 C.F.R. § 2.28 (b) (for all purposes but the Federal Water Pollution Control Act, “contiguous zone” means all areas from the territorial sea out to 24 miles); cf. Schoenbaum, *supra* note 18, at § 2-15. Cf. BENEDICT ON ADMIRALTY, *supra* note 76, at § 112 (“Although the United States has declared its intention to accept most of the provisions of the Convention as statements of customary law binding upon them apart from the Convention, no official declaration has been made to extend its contiguous zone to 24 miles as the LOS Convention permits”).

⁸³ Weapons of Mass Destruction.

⁸⁴ Logan, *supra* note 74, at 266.

⁸⁵ In fact, “special security rights” in their entirety were specifically excluded from the original contiguous zone treaty provision, Convention on the Territorial Sea and Contiguous Zone, *supra* note 80, at art. 24, as being so vague as to invite abuses, and for being unnecessary. The International Law Commission commentary on this provision notes that “[t]he enforcement of customs and sanitary regulations [immigration having been later added to the treaty’s terms] will be

imports would clearly violate “customs regulations,” and therefore would “readily fall within [one] of the four categories of Article 33.”⁸⁶ Similarly, a state can deny entry to crewmembers whom it suspects of attempting to effect a terrorist plot under immigration regulations, making the vessel subject to boarding in the contiguous zone under article 33.⁸⁷ Therefore, a vessel which is allegedly carrying terrorism-related materiel or personnel would certainly be subject to a boarding in the contiguous zone for the purposes of customs and immigration enforcement.

Under the right of “hot pursuit” a state may effect an arrest of a vessel that committed a violation within the coastal state’s internal waters, territorial seas, or contiguous zone, and then fled toward waters outside the jurisdiction of the coastal state, hereinafter referred to as international waters.⁸⁸ That state may continue pursuing into international waters so long as the pursuit is not “interrupted,” and must cease if the vessel enters another state’s territorial waters.⁸⁹ This provision means that in the rare instance of a vessel fleeing outside of the contiguous zone, under UNCLOS a state’s jurisdictional reach can actually exceed 24 miles.

Therefore, if the U.S. Intelligence Community levies terrorism threat reporting against a ship anywhere within 24 nautical miles of the United States coast, it would be subject to United States jurisdiction. The authority being clearly in place under customary international law and treaty law, this is the strongest scenario in which to justify preemptive action in response to a developing maritime terrorism threat.

sufficient in most cases to safeguard the security of the State.” It then notes that the general principles of international law further provide for self-defense, where the contiguous zone provision is not availing. *See infra* Part III.F.

⁸⁶ *See* 42 U.S.C. §§ 2014 and 2077 (prohibiting the importation of enriched nuclear material); 18 U.S.C. § 175 (proscribing possession or transfer of biological weapons); 18 U.S.C. § 229 (same for chemical weapons).

⁸⁷ 8 U.S.C. § 1182(a)(3)(B)(i)(II) (making inadmissible to the United States any alien reasonably believed to be likely to engage in terrorist activity after entry). *Reviewed by* 23 A.L.R. Fed. 2d 171, *Validity, Construction, and Application of 8 U.S.C.A. § 1182(a)(3)(B), Providing for Inadmissibility of Persons Engaged in Terrorist Activity*.

⁸⁸ High Seas Convention, *supra* note 26, at art. 23 (“The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State.”). These rules are repeated in UNCLOS, *supra* note 8, at art. 111(1, 3, 4 and 5). A pursuit may begin in the contiguous zone only “if there has been a violation of the rights for the protection of which the zone was established.” *Id.* at art. 111(1).

⁸⁹ High Seas Convention, *supra* note 26, at art. 23(1) and (2). *Cf. Akehurst’s, supra* note 34, at 187.

B. Consent of a Vessel's Master

Where intelligence reporting identifies a ship as a terrorism threat before it is within 24 nautical miles of the United States coast, coastal-state jurisdiction is not yet availing as a basis for non-consensual boardings.⁹⁰ In this scenario, if the U.S. Government believes that it needs to board the ship while still in international waters, its best course of action would ordinarily be to seek the consent of the master before boarding.⁹¹

It is a well established principle that the master of a vessel has complete authority over his vessel.⁹² This principle has historically followed from the nature of seafaring; once a vessel left port, it was completely severed from communication with its owners. The master was and still is necessarily endowed with complete authority over his ship as an agent of the owners.⁹³ The captain is not only the owners' agent, but in every sense of the title, their "officer."

Recent scholarship has speculated that modern advancements in satellite and other forms of ship-to-shore communication have "undermined the traditional autonomy of the ship's master" to such an extent that a master's

⁹⁰ Additional jurisdiction of a coastal state over its "continental shelf" and "exclusive economic zone" (EEZ) is omitted from this discussion as irrelevant. Those provisions, embodied in Parts V and VI of UNCLOS, *supra* note 8, relate only to the exploitation of resources within and below the water column beyond 24 nautical miles. The term "high seas" denotes only those seas outside of a coastal state's EEZ, territorial seas and internal waters. UNCLOS, *supra* note 8, at art. 86. This article will, however, use "high seas" interchangeably with "international waters" as referring to all seas outside of coastal states' contiguous zones and territorial seas.

⁹¹ Wilson, *supra* note 23, at 160, *citing* U.S. Dep't of the Navy, NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations*, July 2007, § 3.11.2.5.2 [hereinafter *Commander's Handbook*]. The U.S. Government would likely also begin to seek flag-state consent, should the master refuse. If the vessel carries the flag of a PSI-participant state, obtaining such master's consent may be less important. *See* Part III.C. Obviously, if the terrorism plot involves a witting crew, master's consent will not be forthcoming.

⁹² *See* Chamberlain v. Chandler, 5 F.Cas. 413, 414 (C.C.D. Mass. 1823) (Story, J.) (a master's authority at sea is absolute; execution of his duties is reasonably performed under his broad arbitrary discretion).

⁹³ The law is unapologetic in its vigorous support of this authority. In addition to being able to bind his owners in contract, 70 AM. JUR.2D *Shipping* § 360, the ship's master, for the sake of shipboard discipline, has been empowered to place his crewmembers "in irons" and restrict their diet to "bread and water" for continued discipline. 25 BERKLEY J. OF EMP. & LAB. L. 275, 292, *citing* Act of Dec. 21, 1898, ch. 28, § 19, 3 Stat. 755, 760-61. Today, these punishments have been only slightly softened to confinement to quarters and a diet of water and 1,000 calories per day. *Id.*, *citing* 46 U.S.C. § 11501(4-5) (also including loss of pay). *Cf.* 70 AM. JUR. 2D *Shipping* § 338 (disobeying orders).

historical authority to consent to any boardings of his ship has been mitigated.⁹⁴ But this conclusion fails on account of its flawed original premise, which is that “flag state consent is required for another state to exercise jurisdiction,” and only where a vessel’s master has sufficient *positive* authority under international law to permit a boarding does an exception to the flag-state-consent requirement exist.⁹⁵ This view sees that the historically broad authority possessed by shipmasters to allow aboard whomever they deem fit existed only because an inability to communicate with the flag state required such on-site authority.

There are two errors in this view. First, it presupposes that a foreign power boarding a ship under the master’s consent has exercised jurisdiction over his ship.⁹⁶ This is not at all the case, however, as the boarding team is on board not to assert some legal jurisdiction, but as the master’s guests,⁹⁷ and because the master retains the right to withdraw his consent at any time during the boarding. As there is no exercise of jurisdiction over the ship, UNCLOS and other international law sources do not demand flag-state consent.

Second, it seems to conflate the legal nature of a ship’s steel deck with true earthen “territory” of the flag state, such that, under the territorial principle of international law, positive authority to allow foreigners aboard must be

⁹⁴ See Hodgkins, et al., *supra* note 48, at 588, 591-604 (2007). While the authors find positive authority that a master may grant consent to board where there is a threat to his vessel’s safety, they doubt the validity of such consent where the threat is to a third-party person or state and not his own vessel, *e.g.*, where an alleged terrorist agent is within his crew waiting to illegally enter the United States. *Id.* at 590. In other words, they do not believe that the master’s authority over his vessel is plenary. While the authors find positive authority that a master may grant consent to board where there is a threat to his vessel’s safety, they doubt the validity of such consent where the threat is to a third-party person or state and not his own vessel, *e.g.*, where an alleged terrorist agent is within his crew waiting to illegally enter the United States. *Id.*

⁹⁵ *Id.* at 551.

⁹⁶ *Id.* at 590 (considering whether the master’s authority to permit boardings is sufficient enough to constitute an “exception” to the requirement of flag-state consent before “another state [may] exercise jurisdiction over a vessel”). If the boarding state is not exercising “jurisdiction” when it boards under a master’s consent, then no exception to the flag-state consent requirement is necessary.

⁹⁷ See Wilson, *supra* note 23, at 193, quoting *Commander’s Handbook*, *supra* note 91, at § 3.11.2.5.2 (“A consensual boarding is conducted at the invitation of the master...of a vessel that is not otherwise subject to the jurisdiction of the boarding officer. The plenary authority of the master over all activities related to the operations of his vessel while in international waters is well established in international law and includes the authority to allow anyone to come aboard his vessel as his guest, including foreign law enforcement officials.”). Commander Wilson further quotes the Handbook as follows: “Although a master may consent to the boarding and searching of his ship, that consent does not allow the assertion of law enforcement authority—such as arrest or seizure. A consensual boarding is not an exercise of maritime-law-enforcement jurisdiction.” *Id.* at n.259, quoting *Commander’s Handbook*, *supra* note 91, at § 3.11.2.5.2.

identified.⁹⁸ But notions of shipboard territoriality are unique under international law, and only analogous to shore-side territoriality principles.⁹⁹ To demand that a master have positive flag-state authority before he may allow a foreigner aboard his ship, one would have to see a rigid relationship between shipboard embarkation and shoreside immigration. But the realities of shipping, with countless foreign authorities and laborers boarding at each port call, proves this analogy to be false.¹⁰⁰ No passport is checked at embarkation, no customs officer is assigned to each merchant vessel, and masters are not trained in the immigration laws of their flag state.¹⁰¹

Because a master is not granting jurisdiction to a foreign power when he consents to a boarding, and because no national immigration occurs that would demand a master have positive authority to permit boardings, the conclusions of those who doubt a master's plenary authority to allow or deny boardings of his vessel are erroneous. While it is especially true that a Master may consent to a boarding by a non-flag-state agent where vessel safety is at stake, he may also allow foreign agents to board his ship on nothing more than a whim.¹⁰²

⁹⁸ Hodgkins et al., *supra* note 48, at 590 ff. This conclusion, that the authors' demand for positive authority is based on their erroneous conflation of the ship's deck with earthen territory, is based on their consideration that master's consent is an *exception* to the flag-state consent requirement of international law, which itself is a corollary to the "general principle of law" that "a vessel in international waters is subject only to the jurisdiction of the state under which it is flagged." This general principle of law flows from the nautical nature of a ship's "nationality", which itself involves the unique analogy between a ship and its flag-state's territory. But the corollary claimed can only be true if the authors mean the ship is actual territory. In truth, the corollary does not hold. *See supra*, Part II.A.

⁹⁹ *See supra*, Part II.A.

¹⁰⁰ As anyone who has arrived in a foreign port aboard a merchant ship knows, keeping foreign nationals off one's ship would be a commercially unworkable proposition. In addition to longshoremen gangs, vendors who customarily appear in port states such as Egypt, canal seamen through both the Suez and Panama canals, customs officers, health inspectors, vetting inspectors, harbor pilots, their apprentices, a docking pilot, ship's agents, and port officers preparing for cargo movements, the number of foreigners that come aboard for even moderate in-port maintenance or repairs can be numerous. Nelick, *supra* note 4.

¹⁰¹ *Id.* Captain Nelick assures the author that there is nothing in the extensive regimen of a master's licensing coursework and examinations that require an understanding that he would be upsetting the United States if he let foreigners aboard his ship. *Cf.* U.S. Coast Guard Deck Exam Questions, available at http://www.uscg.mil/nmc/mmic_deckexquest.asp (giving the pool of questions that could be asked of a candidate for licensure as master of a U.S. merchant ship of unlimited tonnage, and *not* including questions related to allowing foreign nationals aboard a U.S.-flagged ship).

¹⁰² The authority of the master under international law to authorize boardings of his own vessel is discussed thoroughly in Wilson, *supra* note 23, at 193. Commander Wilson concludes that a ship's master may consent to boardings from foreign military or law enforcement, because his authority is plenary. *Id.* at 198. As a fall-back argument, he also finds a positive grant of consent authority from international law sources.

The plenary *authority* of a master to consent to any boarding as he sees fit causally results from his plenary *responsibility*. The master is always on scene, and under the principles of prudent seamanship,¹⁰³ he would be in derogation of his responsibility were he to defer judgment related to his ship's safe operations to anyone not under his supervision, including the ship's owners.¹⁰⁴ He personally faces not only administrative consequences for any failure to act competently,¹⁰⁵ but also fairly severe civil liability and criminal punishment.¹⁰⁶ For example, a recent American case saw the conviction of *both* the master and owner (as well as several other involved officers) for the illegal dumping of 440 tons of oil-contaminated grain into the ocean from the American ship *S.S. Juneau*.¹⁰⁷ The master was held criminally responsible because of his conduct, even though he had only recently signed aboard, and was merely complying with the instructions of the ship's owners.¹⁰⁸

As the ease of modern communication has not reduced the master's responsibility, it has not reduced his authority to perform acts such as consenting to boardings. If anything, modern communication has increased the burden of prudence on owners without detracting at all from the responsibility of shipmasters.¹⁰⁹ The idea that the master's authority is supreme exists in the

¹⁰³ Cf. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16, rule 2(a) (nothing in the collision regulations shall exonerate a master or his crew from the neglect of "any precaution which may be required by the ordinary practice of seamen..."), and rule 8(a) (any action taken to avoid a collision shall be made with "due regard to the observance of good seamanship."). These are references to the admiralty negligence "prudent seamanship" standard, by which a master and his crew are judged in the instance of any mishap. Cf. Schoenbaum, *supra* note 18, at § 14-2 (the negligence standard in collision cases is "whether judged against the standard of good and prudent seamanship, the collision could have been prevented by the exercise of due care.").

¹⁰⁴ It goes without saying, of course, that the owner can discharge a master with whose judgment it does not agree. 70 AM. JUR. 2D *Shipping* § 214. But this cannot occur on the high seas when no replacement is present.

¹⁰⁵ *I.e.*, suspension or revocation of professional licensure, which can occur for a variety of reasons, including such broad standards as when a mariner commits an "act of misconduct" or "has committed an act of incompetence relating to the operation of a vessel." 46 U.S.C. § 7703 (2000) and 46 C.F.R. § 10.223 (2000). Such incompetence could conceivably include refusal to cooperate with foreign agents who seek to remove WMD or other terrorism-related materiel or personnel from his vessel.

¹⁰⁶ See *Van Shaick v. U.S.*, 159 F. 847 (2nd Cir. 1908) (holding that a shipmaster may be criminally liable for negligent manslaughter, even absent intent).

¹⁰⁷ *United States v. Stickle*, 454 F.3d 1265, 1269 (11th Cir. 2006). Captain McKay entered a plea of guilty. *United States v. Stickle*, 355 F.Supp.2d 1317, 1320. The illegal dumping was a violation of 18 U.S.C. § 2 (2000) and 33 U.S.C. § 1908(a) (2000).

¹⁰⁸ *Id.*

¹⁰⁹ This fundamental point is reinforced by the recent "Safety Alert" issued by the Investigations Office of United States Coast Guard Sector Hampton Roads, *Navigation in Restricted Visibility*, SAFETY ALERT HMRMS 04-07, Dec. 13, 2007. The Alert addressed recent marine casualties that all occurred in conditions of restricted visibility. It advised maritime companies to adopt written

deepest roots of admiralty law, and no modern laws have sought to take away from a shipmaster's power. To the contrary, modern civil and criminal law support the medieval principle¹¹⁰ that all responsibility, and therefore authority, continue to rest on the shoulders of this one individual.

Furthermore, recognizing that consensual boardings are not assertions of foreign jurisdiction, no violation of international law can have occurred. The UNCLOS guarantees that the "high seas are open to all States,"¹¹¹ not to all ships. That a master permits a boarding, when he or she had the ability to decline, does not mean that the flag state's freedom of navigation for commercial or public benefit has been abrogated; the state has no grounds for asserting international responsibility.¹¹²

Having thus dispelled concerns that a master may not be able to grant consent to a boarding by agents of a state other than his vessel's flag state, the principle of a master's authority to consent to all boardings is clear. Where the U.S. Government obtains consent from a vessel's master, it may conduct a lawful boarding and search of the vessel even in international waters.¹¹³

C. Consent of a Flag-state

Similarly, if intelligence reporting indicates the need for a U.S. Government boarding of a foreign-flagged merchant ship while that ship is still in international waters, the United States can seek boarding consent from the ship's flag-state.¹¹⁴ As full jurisdictional authority rests with the flag-state, it

policies about safe operations in restricted visibility that clearly place "the responsibility for sailing a vessel with the vessel's master, and *prohibit interference or second-guessing by shoreside managers*" (emphasis added).

¹¹⁰ Hodgkins et al., *supra* note 48, and Wilson, *supra* note 23, both discuss the medieval rise of the use of hired captains so that ship owners could remain ashore to enjoy their wealth, and the concomitant delegation of their authority.

¹¹¹ UNCLOS, *supra* note 8, at art. 87, para. 1.

¹¹² State responsibility is the international law analogue to civil liability between private parties, although it is more broadly concerned with (1) whether there has been an "internationally wrongful act," (2) what the legal consequences should be, and (3) how much "responsibility" may be imposed. *Akehurst's*, *supra* note 34, at 254. This "responsibility" can raise the obligation of cessation of wrongful acts, of full reparation to the wronged state, "satisfaction" in the form of an apology or the like and issuing guarantees of non-repetition of wrongful acts. *Id.* at 271.

¹¹³ There are several reasons why a ship master might consent to otherwise invasive boardings. He "may fear that refusal will lead to reasonable suspicion that he is engaged in criminal behavior," thus leading to some kind of delay or detention, or he may believe that consent would make a later denial of knowledge of illegal conduct seem more plausible. Wilson, *supra* note 23, at 185.

¹¹⁴ In the rare case of the "stateless vessel," where a ship is without a flag state, it enjoys no protection from a sovereign nation under the law of the sea, so flag-state consent would be neither possible nor necessary. *See supra* note 33 and accompanying text.

has authority to grant boarding consent¹¹⁵ to a third-party State.¹¹⁶ This principle underpins the bi-lateral “ship boarding agreements” made ancillary to the post-9/11 Proliferation Security Initiative (PSI).¹¹⁷

In a threatening scenario, flag states may well be forthcoming with their consent in order to avoid the political embarrassment that could ensue if U.S. intelligence should turn out to be credible. However, for states with strained diplomatic relations with the United States, particularly if the evidence of terrorism activity is withheld as classified intelligence, consent may be more difficult to obtain. Also, States which operate nationalized shipping lines, vice merely registering private commercial ships to carry their flag, will have a stronger sense of some sovereign encroachment caused by high-seas boardings of their state-owned, state-operated vessels. One can anticipate a greater likelihood that these states, which include China, Iran, North Korea, and Pakistan, would be less inclined to grant consent based on undisclosed intelligence threat reporting.

The U.S. Government has not been content to wait until the heat of the moment to begin the process of obtaining consent. If intelligence reporting does not appear until a potentially threatening vessel is 100 nautical miles out from

¹¹⁵ It is necessary to distinguish between the master’s narrow authority to override his ship’s owners grant of consent, which is based on his responsibility for on-scene safety of vessel and crew at all times, and his lack of authority to override his ship’s flag state. Where a foreign state boards *over* a master’s objections based on the owners’ consent, the vessel has suffered an inhibition of its freedom of navigation, which is an internationally wrongful act (raising a claim for remediation by the flag state). That the owners consented would be no defense, because the wronged party is the flag state, a sovereign power, and the wrongful act was the obstruction of the flag-state’s vessel’s right to navigate freely (which must implicitly mean safely). Contrariwise, where a foreign state boards over a master’s objections based on the flag state’s consent, there has been no wronged party, because the flag state itself consented to, and was complicit in, this inhibition in its vessels’ freedom of navigation. The distinction, then, is in which party is wronged, and whether that party has standing in international law.

¹¹⁶ The ship’s owners and crew could still have claims for a negligent interdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000). In other words, flag-state consent may only remove “State Responsibility” (the international law’s form of “liability” of one state owed to another) without removing civil (vice international) causes of action offered to individual foreign nationals. In this sense, a master’s consent may offer *more* protection of U.S. legal interests than would flag-state consent.

¹¹⁷ Discussed *infra* this part. See Remarks by the President to the People of Poland, 39 Weekly Comp. Pres. Doc. 700 (May 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>. See also, The Proliferation Security Initiative: Statement of Interdiction Principles (Sep. 4, 2003), available at <http://usinfo.state.gov/products/pubs/proliferation/proliferation.pdf> [hereinafter PSI].

the United States coast, and she is steaming at over 25 knots, three hours¹¹⁸ may not be sufficient time for the U.S. Government to obtain consent through diplomatic channels and send out a capable response force. Because of this concern, advanced-consent efforts began shortly after September 11, 2001 that developed into the PSI and subsequent “ship boarding agreements.”¹¹⁹

The PSI, carefully referred to as a *non-treaty* in its own text,¹²⁰ is a voluntary effort by now more than 80 nations to limit the spread of weapons of mass destruction, and includes “principles” for the interdiction of maritime shipments.¹²¹ If a potentially threatening ship is flagged by one of the PSI states with which the United States has a bilateral “ship boarding agreement,” obtaining flag-state consent theoretically will be expedited.¹²² Some of the more recent agreements contain terms providing for ‘deemed consent’ where the requested State has acknowledged receipt of a request, but not given a reply within a certain amount of time.¹²³ These deemed-consent provisions, as narrow as they are, represent the furthest advance in the United States’ efforts to obtain

¹¹⁸ As the last 24 nautical miles of a ship’s approach would be within the United States’s contiguous zone and territorial sea, consent would become irrelevant after the first three hours of this hypothetical threat being identified.

¹¹⁹ PSI, *supra* note 117. The State Department’s efforts evidence its appreciation that anticipatory self-defense, discussed *infra* Part III.F, is at least a disfavored justificatory basis for high seas boardings.

¹²⁰ *Id.* (“The PSI is a set of activities, not a formal treaty-based organization”). It does not create formal obligations for participants, but “a political commitment to “best practices” to stop proliferation-related shipments.” *Id.*

¹²¹ *Id.* As the purpose of PSI agreements is to promote cooperation between states in “stopping shipments of weapons of mass destruction (WMD), their delivery systems, and related materials worldwide,” *id.*, it does not create a cooperative framework for the case of needing to interdict potentially nefarious crewmembers. While such bad actors are more amenable to interdiction after the ship arrives in port than are weapons of mass destruction comingled with a ship’s cargo, in a threat scenario where they might hijack a ship to ram into a U.S. target, a high seas interdiction seems desirable. Therefore, one must bear in mind the limited scope of PSI as a consent-seeking “cooperation” mechanism.

¹²² *See, e.g.*, Agreement Between the Government of the United States of America and the Government of the Republic of Liberia Concerning Cooperation To Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials By Sea, U.S.-Liber., Feb. 11, 2004, 2004 WL 3214814 (Treaty), available at <http://www.state.gov/t/isn/trty/32403.htm>. This and similar ship boarding agreements do not provide carte blanche authority to the non-flag-state (or “requesting”) party to board a ship, but provide that the requesting state “may request through the Competent Authority of the [flag state]” 1) confirmation of the vessel’s claimed nationality, and 2) if so confirmed, authorization to board and search the vessel. Since nothing prohibits any state from the mere *making* of such a request even without a pre-existent bilateral ship boarding agreement, its primary benefit appears to be in setting formal and informational requirements for such requests, with the aim of expediting responses. *Id.*

¹²³ Douglas Guilfoyle, *Maritime Interdiction of Weapons of Mass Destruction*, 12 J. CONFLICT & SECURITY L. 1, 24 (noting a two-hour deemed consent clause in the bilateral U.S.-Liberia and U.S.-Panama ship boarding agreements, and a four-hour clause in the U.S.-Marshall Islands agreement).

advanced permission to board foreign-flagged ships in international waters in a terrorism threat scenario.

Most PSI participants have not signed any ship boarding agreements. Presently, such agreements only exist with Belize, Croatia, Cyprus, Liberia, Panama, the Marshall Islands, Mongolia and Malta.¹²⁴ But despite this small number of states, the program is a partial success for the United States thanks to the cooperation of two of the largest maritime flag-states in the world, Panama and Liberia. Combined, these two flag-states register 30% of the world's maritime tonnage.¹²⁵

The U.S. Government sought to broaden the existence of ship-boarding agreements through a proposed amendment to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988¹²⁶ (SUA Convention), the 2005 SUA Protocol.¹²⁷ This Protocol, which has not entered into force and has been tabled by the Senate Committee on Foreign Relations,¹²⁸ would introduce provisions for the boarding of a ship "where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention."¹²⁹ However, these provisions add no new substantive conditions on, or provisions to the existing bilateral-ship-boarding agreements that the United States has entered. The Protocol would maintain the status quo, that a requesting State may not board a ship without the express authorization of the flag state.¹³⁰

¹²⁴ See Jacquelyn S. Porth, *U.S. Security Initiative Draws More Participants*, U.S. State Department USINFO Article, May 31, 2007 (identifying the first seven such agreements), available at http://seoul.usembassy.gov/410_053107.html, and U.S. State Department, *Media Note: The United States and Mongolia Proliferation Security Initiative Shipboarding Agreement*, Oct. 23, 2007 (announcing the most recent such agreement), bringing the total number of bilateral agreements to eight.

¹²⁵ Hodgkins, et al., *supra* note 48, at 661, citing Ashley J. Roach, *A Proliferation Security Initiative (PSI): Countering Proliferation by Sea*, in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 354 (Myron H. Nordquest et al. eds., 2006).

¹²⁶ Convention and Protocol from the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668.

¹²⁷ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation [hereinafter 2005 SUA Protocol], Feb. 17, 2006, S. Treaty Doc. No. 110-8, 2006 WL 5003319 (Treaty) (presently before the Senate Committee on Foreign Relations).

¹²⁸ *Id.*

¹²⁹ International Maritime Organization, *Briefing 42*, Oct. 17, 2005. Specifically, Article 8(2) of the 2005 SUA Protocol would create a "shipboarding regime." *Supra* note 127.

¹³⁰ 2005 SUA Protocol, *supra* note 127, Overview, Shipboarding. The Protocol does not even contain deemed-consent provisions contained in some of the United States' bilateral ship boarding agreements, see Guilfoyle, *supra* note 123, at 30, but does note that upon its ratification, parties may

While PSI ship-boarding agreements and the 2005 SUA Protocol (if ratified) provide an avenue for seeking flag-state consent, the opportunity to use it may be limited and even fleeting. States such as Liberia and Panama are notorious as “flags of convenience,”¹³¹ and their ship-registering administrations generate important revenues for those states. If the United States takes advantage of these states’ apparent spirit of cooperation in a way that economically burdens ship owners, owners may find a more ‘convenient’ flag state. Where the *convenience* of registering with a flag of convenience ends, so will that state’s revenue. Such concerns could mean that a state like Panama may have a strong incentive to withhold its consent to a U.S.-requested boarding, the bilateral agreement notwithstanding. States less swayed by economic concerns, and more inclined to diplomatic comity for its own sake, unfortunately have miniscule merchant marines,¹³² and ones less likely to be used by a terror-bent opponent at that.

For these reasons, bilateral-ship-boarding agreements and the 2005 SUA Protocol, as maritime counterterrorism tools, may prove to be more form than substance if put into practice.¹³³ To prevent this problem, the United States should be prepared to gratuitously compensate ship owners should it ever conduct boardings in international waters based on flag-state consent, to keep the flag-state’s maritime operators profitable and content.

Obtaining flag-state consent to conduct high-seas boardings of a suspected terror-related ship would take longer than obtaining master’s consent, and could require the expenditure of tremendous capital in the diplomatic marketplace. While providing sufficient legal authority for conducting a boarding within the confines of the law of the sea’s principle of freedom, it is likely to be a less effective approach than obtaining a shipmaster’s consent.

declare that they will permit deemed consent, or create comprehensive preemptive permission for other parties to board ships of their own flag.

¹³¹ A “flag of convenience” is generally thought to be a flag-state imposing minimal regulatory, tax and other administrative requirements and burdens. See Anderson, *supra* note 24, at 156, for an extensive analysis of criteria used to identify a particular state as a “flag of convenience.” See also International Transport Workers’ Federation, *Campaign Against Flags of Convenience and Substandard Shipping Annual Report* (2004) (designating Panama and Liberia as flags of convenience), available at <http://www.itfglobal.org/files/seealsodocs/1324/FOCREPORT.pdf>.

¹³² *E.g.*, Norway, with the largest first-world merchant marine in number of vessels registered, ranks only 15th worldwide, with 715 vessels. The United Kingdom and United States rank 23rd and 24th respectively. CIA World Factbook, *Rank Order – Merchant Marine* (2007), available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2108rank.html>.

¹³³ In other words, they may have the worth of one bird in the bush, but not one in the hand. However, to quote another time-honored metaphor, “a living dog is better than a dead lion.” *Ecclesiastes* 9:4 (King James).

D. The Universality Principle and UNCLOS Accession

In seeking the backing of international law to conduct boardings in international waters in response to intelligence threat reporting, the U.S. Government has eight bilateral agreements and the 2005 SUA Protocol¹³⁴ to show for its troubles. These have no more substance than that parties “may seek permission,” and efforts at obtaining broader authority have been unsuccessful.¹³⁵ One can perceive the ongoing resistance at the international level to allowing foreign sovereigns the advance authority to board ships on the high seas, even in the presence of compelling justification. For economically charged political reasons noted in the previous section, it is easy to understand why a flag-state would avoid treaties that give it an appearance of handing away protections in a willy-nilly fashion to other states. But by fitting maritime terror-related activities into the existing universal-jurisdiction exception to the principle of freedom, the United States might claim that legitimate justifications for boarding foreign-flagged ships in international waters already exist, even absent the master’s consent or the flag-state’s consent.

1. UNCLOS Accession

The UNCLOS provides a narrow group of exceptions to its otherwise jealously guarded freedom of navigation on the high seas.¹³⁶ Vessels performing the following acts lose the jurisdictional protection of their flag state, even on the high seas, and become subject to the jurisdiction of any state, or “universal jurisdiction”: transporting slaves, engaging in piracy, trafficking illegal narcotics, and performing unauthorized broadcasting from the high seas.¹³⁷ If the United States accedes to UNCLOS, it could attempt to persuade its peers to add terror-related activity to these four exceptions. It appears that President Barack Obama will follow each of his predecessors since Ronald Reagan in calling for United States accession to the treaty.¹³⁸ The U.S.

¹³⁴ *Supra* note 127. Again, the 2005 SUA Protocol has yet to be ratified.

¹³⁵ *E.g.*, the Bush Administration made a proposal to the International Maritime Organization for a blanket rule that if PSI countries want to board a ship carrying suspected terrorists or WMD-related material on the high seas, they should try to contact the flag state but if no response is received within four hours it will be taken as consent to stop and search the vessel. A TIME BOMB FOR GLOBAL TRADE, *supra* note 19, at 100. This effort has since appeared as an *option* for states that ratify the 2005 SUA Protocol. *Id.*

¹³⁶ UNCLOS, *supra* note 8, at arts. 99, 105, 108, and 109.

¹³⁷ *Id.*

¹³⁸ President Obama said as a candidate that he “will work actively to ensure that the United States ratifies the Law of the Sea Convention – an agreement supported by more than 150 countries that will protect our economic and security interests while providing an important international collaboration to protect the oceans and its resources.” Karen Kaplan, *Obama and McCain Offer*

Department of the Navy also strongly supports United States accession.¹³⁹ Recent Secretary of the Navy Donald C. Winter stated:

As a non-party, the United States does not have access to the Convention's formal processes in which over 150 nations participate in influencing future law of the sea developments, and is therefore less able to promote and protect our security and commercial interests. Additionally, by providing legal certainty and stability for the world's largest maneuver space, the Convention furthers a core goal of our National Security Strategy to promote the rule of law around the world.¹⁴⁰

As a party to UNCLOS, the United States could rally fellow member states to add "vessels engaged in terror-related activities" to the above list of activities subject to universal jurisdiction, causing a vessel so engaged to lose its high seas right to freedom from interference by non-flag states. Unlike form-without-substance PSI opportunities,¹⁴¹ such international-treaty authority would not vanish upon its first instance of being exercised. The United States could even attempt to use promised accession as leverage to achieve this modification of the Convention prior to actually acceding.¹⁴²

2. The Universality Principle

Even without UNCLOS accession, the United States could attempt to have terror-related activity at sea recognized by the community of nations as a

Their Visions of a Scientific America, Sep. 27, 2008, L.A. TIMES, available at <http://articles.latimes.com/2008/sep/27/science/sci-sciencedebate27>. See also *President's Statement on Advancing U.S. Interests in the World's Oceans*, *supra* note 67.

¹³⁹ *The Secretary of the Navy's FY 2008 Posture Statement: Hearing Before the H. Armed Services Comm.*, 110th Cong. 5 (2007) (statement of Donald C. Winter, Secretary of the Navy), available at http://www.navy.mil/navydata/people/secnav/winter/secnav_posture_statement_2007.pdf.

¹⁴⁰ *Id.*

¹⁴¹ See *supra* Part III.C.

¹⁴² However, such negotiation capital may already have been spent. In 1994, the U.S. prevailed in obtaining a rare agreement whereby the already-ratified UNCLOS was to be amended to accommodate U.S. concerns over its Part XI (the sea-bed mining provisions), primarily in order to garner U.S. accession. Bernard H. Oxman, *Law of the Sea Forum: the 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea*, 88 AM. J. INT'L L. 687, 695-696 (1994). Former Secretary of State George Shultz, who served under President Reagan as key advisor to the original Convention negotiations, has stated that he believes the 1994 Agreement adequately addressed the concerns President Reagan had over Part XI. *Letter to Senator Richard Lugar*, June 28, 2007, available at <http://www.oceanlaw.org/index.php?module=News&func=display&sid=25>. The U.S. Senate, however, failed to accede to the Convention. See *supra* note 67.

jus cogens violation.¹⁴³ A rule of *jus cogens* is a recognized ‘peremptory norm of general international law’ that is considered so fundamental that its derogation, by treaty or otherwise, is ineffectual.¹⁴⁴ As such, any *jus cogens* violation would not be protected by the law of the sea’s principle of freedom, as no state has a legitimate sovereign interest in permitting that conduct to continue.¹⁴⁵ Any state may enforce *jus cogens* norms by exercising jurisdiction under the universality principle of international law. For instance, slave transportation and piracy, while explicit exceptions to the principle of freedom within UNCLOS itself,¹⁴⁶ are also recognized as violations of *jus cogens* rules under customary international law.¹⁴⁷ Ships engaged in these activities enjoy no flag-state protection from foreign interference in their free navigation, with or without the existence of UNCLOS as international treaty law. Furthermore, enforcement against *jus cogens* violations is an obligation *erga omnes*¹⁴⁸ – one that binds all nations. As such, not just a territorially affected state, but all states are obliged to enforce against the commission of these “international crimes,” regardless of the place of their occurrence.

While the existence of *jus cogens* rules is recognized in Article 53 of the Vienna Convention,¹⁴⁹ their source is unclear and controversial.¹⁵⁰ That new ones can come into being is directly contemplated by the Vienna Convention,¹⁵¹ but it does not articulate how they come to be, beyond stating their definitional elements of acceptance and recognition “by the international community as a whole.”¹⁵² The generally accepted view is that the substance of rules of *jus*

¹⁴³ This latin term means “compelling law.” BLACK’S LAW DICTIONARY 876 (8th ed. 2004).

¹⁴⁴ OPPENHEIM’S INTERNATIONAL LAW 7 (R. Y. Jennings and A. Watts eds., 1992). *Accord*, Akehurst’s, *supra* note 34, at 57.

¹⁴⁵ The principles underlying *jus cogens* norms, with their effective limitation on the complete power of sovereign states, are no longer based on natural law principles, but they clearly have their origins from that source. *See* Akehurst’s, *supra* note 34, at 57.

¹⁴⁶ UNCLOS, *supra* note 8, at arts. 99 and 105.

¹⁴⁷ *See* REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, at § 404 (*Universal Jurisdiction to Define and Punish Certain Offenses*).

¹⁴⁸ Akehurst’s, *supra* note 34, at 58-59.

¹⁴⁹ *Vienna Convention*, *supra* note 66, at art. 53 (“A treaty is void if... it conflicts with a peremptory norm of general international law. [This] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”).

¹⁵⁰ In negotiations on the drafting of the Vienna Convention, *id.*, art 53, state representatives were unable to reach an agreement on which international norms belong in the *jus cogens* category. France rejected the Convention entirely because of this single article. Akehurst’s, *supra* note 34, at 58.

¹⁵¹ *Vienna Convention*, *supra* note 66, at art. 64 (“If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”).

¹⁵² *Id.* at art 53. At least one scholarly work interprets Article 53’s definition that the international community *as a whole* recognize and accept a peremptory norm as meaning that “an overwhelming majority of states is required, cutting across cultural and ideological differences.” Akehurst’s, *supra*

cogens can be derived only from customary law and the terms of widely adopted treaties.¹⁵³ It is to these sources, then, that an administration would have to point in order to justify a boarding based on *jus cogens* norms.

Short of these *jus cogens* norms, from which derogation is not possible, customary international law could still theoretically provide a rule permitting counter-terrorism boardings. A customary law can be found where there is evidence of “a general practice accepted as law” by states.¹⁵⁴ Thus, customary law exists where an objective element, that of “general practice” of states, and a subjective one, “accepted as law,” are met in the actual practice of states.¹⁵⁵ But, such permission could be negated by treaty law, such as UNCLOS and its strict recognition of the principle of freedom.

As non-consensual boardings are clearly contrary to the law of the sea’s principle of freedom, a state seeking to justify a non-consensual boarding under customary law would need to look to something short of that act itself to find a “regular practice” of states opposing the use of the sea for terror-related activity.¹⁵⁶ This paper has only been able to touch on a few of the international efforts taken since September 11, 2001 to proscribe the use of the seas by terrorist groups.¹⁵⁷ One aspect that has already been discussed, the active pursuit of ship boarding agreements and the proposed 2005 SUA Protocol, adds weight to an argument that a strong custom is emerging in opposition to terror-related use of the seas. This argument gains significant strength in light of Article 88 of UNCLOS, which simply states a customary principle that “[t]he high seas shall be reserved for peaceful purposes.” Furthermore, while the

note 34, at 58. However, opposition by the U.S. and other industrialized states did not stop UNCLOS participants from declaring as a peremptory norm that the high-seas sea beds belong to the common heritage of mankind. Damrosch et al., *supra* note 23, at 107.

¹⁵³ Akehurst’s, *supra* note 34, at 58.

¹⁵⁴ Statute of the International Court of Justice, art. 38, para. 1(b), 59 Stat. 1031, 3 Bevans 1179. *Cf.* The Paquete Habana, 175 U.S. 677, 700 (1900) (maintaining that to find this evidence, “resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.”).

¹⁵⁵ Nicaragua v. U.S. (Merits), 1986 I.C.J. Rep. 14, 97.

¹⁵⁶ However, the *Achille Lauro* incident could provide an example of state practice evidencing a custom against terrorist use of the seas. *See infra*, note 174. While the U.S. ostensibly justified boarding the ship under its counter-piracy universal jurisdiction, that claim is dubious, as modern “piracy” requires conduct aimed toward “private ends,” not political. *See* Aaron D. Buzawa, Comment, *Cruising with Terrorism: Jurisdictional Challenges to the Control of Terrorism in the Cruising Industry*, 32 TUL. MAR. L.J. 181, 200 (2007).

¹⁵⁷ Other examples include the far-reaching 2002 International Ship and Port Facility Code Amendment to SOLAS, *supra* note 5, which passed maritime security requirements binding on governments, ports, and carriers, and the Container Security Initiative, *supra* note 21. A TIME BOMB FOR GLOBAL TRADE, *supra* note 19, at 73.

definition of piracy¹⁵⁸ is not so broad as to directly encompass terror-related activity, the similarity between the two makes terrorist use of the seas a reasonable candidate for future treatment as a rule of *jus cogens*.

If the United States can demonstrate general international recognition of a customary law against terror-related use of the seas, it could hope to eventually ratchet that custom up to the level of a *jus cogens* norm, such that ships so engaged would lose their flag-state's protection.¹⁵⁹ Therefore, United States diplomatic efforts should encourage consistent state practices and treaty provisions against terror-related maritime activities to build a case that there is widespread acceptance and recognition by the international community as a whole against these inimical activities. Once the case can be made that the animus of the international community has reached the somewhat vague standard necessary to be a peremptory norm, if in fact this has not already occurred,¹⁶⁰ the conduct will be under universal jurisdiction, an exception to the principle of freedom. If so recognized, the United States could board threatening ships well in advance of their arrival in any nation's jurisdictional waters. However, this potential basis for high seas foreign-flagged boardings remains a distant possibility.

E. United Nations Security Council Resolutions

The U.N. Security Council was created “to ensure prompt and effective action by the United Nations”¹⁶¹ in order to achieve its premier purpose, which is “to maintain international peace and security.”¹⁶² To this end, the Security Council is empowered to authorize forceful actions by member states.¹⁶³ A terrorism threat proceeding toward the United States from international waters would constitute a threat to international peace and security, and so would merit Security Council response. At least in principle, therefore, the United States might be prudent to seek a U.N. Security Council Resolution (UNSCR)

¹⁵⁸ UNCLOS, *supra* note 8, at art. 101 (defining maritime piracy essentially as acts committed for private ends directed on the high seas against another ship). *Construed in Buzawa*, *supra* note 156 (arguing that private religious and financial motivations of those employed by political powers still meets the modern international law definition of piracy).

¹⁵⁹ This progression of a customary law against certain conduct being ratcheted up to a *jus cogens* norm is not unprecedented. For example, this occurred with the rule against transporting slaves, and the rule against genocide.

¹⁶⁰ See REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, at § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, . . . and perhaps certain acts of terrorism” (emphasis added)).

¹⁶¹ U.N. CHARTER art. 24, para. 1.

¹⁶² *Id.* at art. 1, para. 1

¹⁶³ *Id.* at arts. 24, para. 2 (referring to the provisions of Chapters VI, VII, VIII, and XII), and 25.

authorizing a needed non-consensual, non-flag-state boarding of a threatening vessel while it is still in international waters.¹⁶⁴

However, given the amount of time necessary to obtain such a resolution, and the inherent political costs and tensions involved, this option would be available only for extreme circumstances, such as where the ship is suspected of containing a completed and detonation-ready nuclear weapon. While seeking a UNSCR to authorize a single boarding of a single threatening ship would be a novel approach, Security Council precedent does exist that more broadly authorizes foreign-flagged boardings.¹⁶⁵

In 1966 the U.N. Security Council adopted Resolution 221 as part of an effort to quell rebellion in Southern Rhodesia.¹⁶⁶ This resolution “called upon all states to ensure the diversion of any of their vessels reasonably believed to be carrying oil destined for Southern Rhodesia which may be en route for Beira, [and] called upon the Government of the United Kingdom . . . to prevent, by use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia.”¹⁶⁷ This authority was used when *H.M.S. Berwick* crewmembers conducted an armed boarding of a non-consenting tanker.¹⁶⁸ Later resolutions supported and strengthened the authority to enforce the Rhodesian embargo through non-consensual ship boardings.¹⁶⁹ Similar resolutions passed to allow the enforcement of sanctions against Iraq following its 1990 invasion of Kuwait,¹⁷⁰ and to enforce the U.N. embargo of the Former Republic of Yugoslavia in 1992.¹⁷¹

These historical examples demonstrate that boarding authority obtained appurtenant to UNSCRs has been used to effect limited or total embargoes. However, a recent UNSCR provides a negative example of the Security Council’s willingness to authorize foreign-ship boardings, and reinforces the high respect in international law for flag-state sovereignty. Resolution 1874, aimed at preventing the proliferation of nuclear material to or from North Korea,

¹⁶⁴ Should such an effort prove successful, it would add support to the formation of a customary law against terrorist-related use of the sea. See *supra* Part III.D.

¹⁶⁵ Hodgkins, et al., *supra* note 48, at 609-630, contains extensive discussion of the use of UNSCRs to authorize Maritime Interdiction Operations done by U.S. and “coalition” naval forces.

¹⁶⁶ S.C. Res. 221, U.N. Doc. S/RES/221 (Apr. 9, 1966).

¹⁶⁷ *Id.* at ¶¶ 4-5. That is, it required all states to see that vessels they registered did not transport this oil, and it authorized Great Britain alone to use force against vessels of *any* flag to this end.

¹⁶⁸ Hodgkins, et al., *supra* note 48, at 612, citing J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT’L L. 103, at 118 (1968).

¹⁶⁹ E.g., S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966) (declaring that all member states shall prevent all commerce and other shipments to and from Rhodesia).

¹⁷⁰ S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

¹⁷¹ S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992).

calls “upon all Member States to inspect vessels, *with the consent of the flag State*, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains [prohibited cargo].”¹⁷² In early 2003, the Bush Administration was unable to obtain a UNSCR as broad as the embargo examples to permit ship interdictions to combat the proliferation of WMDs. These efforts were retooled to focus on PSI by the end of that year.¹⁷³

While the Security Council has the authority to authorize a non-consensual boarding ancillary to its authority to authorize forceful actions, history does not provide instances of authorization for an isolated, particular boarding on intelligence information.¹⁷⁴ In practice, it would take the most exceptional of factual circumstances, and with sufficient interdiction time, for this to be a workable legal response to a terror-related maritime threat.

F. Anticipatory Self-defense

Article 2(4) of the U.N. Charter states that, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁷⁵ The exception to this “norm of peace” is found in Article 51, which provides that:

Nothing in the present Charter shall impair the *inherent right of individual or collective self-defence if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain

¹⁷² S.C. Res. 1874, U.N. Doc. S/RES/1874, para. 12 (June 12, 2009) (emphasis added).

¹⁷³ Interview by the Arms Control Association with John Bolton, former Undersecretary of State for Arms Control and International Security (Nov. 4, 2003) (“we don’t contemplate at this point, nor do the other PSI members, seeking Security Council authorization”), available at <http://www.armscontrol.org/aca/midmonth/2003/November/Bolton.asp>. See *supra* Part III.C (discussing the Proliferation Security Initiative).

¹⁷⁴ Indeed, history provides an instance where UNSCR authorization was unavailing. In the October 1985 hijacking of the *S.S. Achille Lauro*, members of the Palestinian Liberation Front, after infiltrating an Italian-flagged Mediterranean cruise ship by disguising themselves as passengers, held the ship hostage in order to secure the release of Palestinian prisoners held in Israel. They ultimately shot, killed and threw into the sea a Jewish American wheelchair-bound 69 year-old man, Leon Klinghoffer. See Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 287-288 (1988). Due to the immense tension between Italy and the U.S., no state formally submitted a resolution to allow a responsive boarding before the U.N. Security Council. Karel Wellens, *Resolutions and Statements of the United Nations Security Council (1946-1989): A Thematic Guide*, intro. n.3.

¹⁷⁵ U.N. CHARTER art. 2, para. 4.

international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁷⁶

The general rule proscribing “force” would include within its reach the non-consensual boarding and search of a vessel flying the flag of another state in international waters.¹⁷⁷ The exception for self-defense is “inherent” based on the principle that a legitimate member State has a right to exist, and so to take precautionary measures to ensure its continued existence.¹⁷⁸ It is within this framework of tension between a state’s inherent right of self-preservation and Article 51’s seeming requirement of a prior actual attack that the controversial doctrine of “anticipatory self-defense” has been debated.¹⁷⁹ In any event, if an actual attack does justify the use of self-defensive force, the Charter limits this force to a period of time “until the Security Council has taken measures necessary to maintain international peace and security.”¹⁸⁰

Some have maintained that within the context of non-consensual ship boardings the right of anticipatory self-defense is more expansive under customary international law than as provided in the U.N. Charter.¹⁸¹ This view of a customary right outside of the U.N. Charter is opposed to one that sees a limiting effect by the Charter’s text itself, which voluntarily supersedes any rights a signatory state might otherwise have under international law.¹⁸² Textually, Article 51 seems to require that any lawful use of self-defensive force would have to be preceded by armed attack. Proponents of the right of

¹⁷⁶ *Id.* at art. 51 (emphasis added).

¹⁷⁷ A non-consensual boarding would be a use of force, that is, if no other exception to the principle of freedom existed. See *supra*, note 51, and accompanying text, discussing that a non-consensual boarding of a foreign ship may be a *casus belli*.

¹⁷⁸ See *infra* text accompanying note 188 (discussing the *Caroline Case*).

¹⁷⁹ The term “anticipatory” does not appear in the U.N. Charter. This doctrine has been endorsed by the Bush Administration. *The National Security Strategy of the United States*, *supra* note 14 (“we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting preemptively against [] terrorists, to prevent them from doing harm against our people and our country”).

¹⁸⁰ U.N. CHARTER art. 51. Even though the United States has been attacked by al-Qaeda, subsequent Security Council Resolutions may deprive the U.S. from justifying self-defensive force as non-anticipatory.

¹⁸¹ See, e.g., Barry, *supra* note 48, at 321-322.

¹⁸² Except, of course, where *jus cogens* principles are involved, as their derogation by treaty is ineffectual. See *supra* Part III.D.

anticipatory self-defense argue that this meaning is only an “implication,”¹⁸³ and that the word “if” in Article 51 should not be construed as meaning “if and only if.”¹⁸⁴ The continuing debate over anticipatory self-defense,¹⁸⁵ then, centers around whether the general rule of Article 2(4), which creates a “norm of peace,” or the pre-existing customary law allowing anticipatory self-defense, provides the interpretive context for the claimed ambiguity in Article 51.

If the premise of those advocating for the customary international law right of anticipatory self-defense is granted, then anticipatory self-defense could justify non-consensual boardings of foreign-flagged ships at sea, even preceding an actual attack from their flag-state.¹⁸⁶ These advocates recognize the need for two prerequisites to the use of anticipatory self-defense, necessity and proportionality, which have been well established in customary international law. This need exists because of the obvious problem that occurs once one recognizes such a right: how much can a state *anticipate*? If the sterling sports cliché that “the best defense is a good offense” holds true, the most motivated defenders could use the permissive-but-not-proscriptive interpretation of Article 51 to the devastation of Article 2(4).¹⁸⁷ High-seas boardings could occur with only the slightest “articulable suspicion” that a ship’s voyage has a politico-terrorism nexus. Therefore, anticipatory self-defense advocates defer to the customary prerequisites on the use of force.

These prerequisites were famously articulated during the “Caroline Affair.” In that late 1837 episode, British Royal Navy sailors seized a U.S.-flagged ship, the *S.S. Caroline*, lit her ablaze, and set her drifting in the current across Niagara Falls.¹⁸⁸ Great Britain justified this action as necessary to preempt what would have been *Caroline*’s continued support to Canadian rebels across the Niagara River.¹⁸⁹ These events led to correspondence between U.S. Secretary of State Daniel Webster and the British Crown in order to settle state responsibility.¹⁹⁰ From this correspondence, Webster receives credit for having laid the groundwork for what grew into the doctrine of anticipatory self-

¹⁸³ See e.g., *Akehurst’s*, *supra* note 34, at 311.

¹⁸⁴ *Id.* at 312.

¹⁸⁵ The author does not intend to resolve this debate.

¹⁸⁶ On the other hand, if the premise of those advocating the use of the Charter’s norm of peace under Article 2(4) is granted, this section on anticipatory self-defense will not offer boarding justification of a ship flying the flag of a state which has not already attacked the United States.

¹⁸⁷ “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, para. 4.

¹⁸⁸ Louis-Philippe Rouillard, *The Caroline Case: Anticipatory Self-Defence in Contemporary International Law*, 1 MISKOLC J. INT’L L. 104 (2004).

¹⁸⁹ The Niagara River runs between Ontario and New York state.

¹⁹⁰ Rouillard, *supra* note 188, at 109-110.

defense,¹⁹¹ otherwise known as the doctrine of preemption.¹⁹² He would accept the British claim of anticipatory self-defense if they could show an overwhelming necessity for self-defense without “moment for deliberation,” that was also not “unreasonable or excessive” in relation to the necessity.¹⁹³ Thus two elements of a claim of anticipatory self-defense have been commonly drawn from Secretary Webster’s letter and persist to the present: necessity and proportionality.¹⁹⁴

Taking these elements in turn, the case for boarding a foreign-flagged ship on the high seas, even where one accepts the continuing validity of the doctrine of anticipatory self-defense, is not clear-cut. The first prerequisite, necessity, has to exist even in the face of the 24-nautical-mile buffer that already exists around the United States coastline. Under Webster’s articulation, only in the absence of a moment for deliberation will the prerequisite necessity be shown. Even the fastest of merchant vessels is about an hour from the United States coast when it enters the U.S. Contiguous Zone, where U.S. jurisdiction independently allows a boarding without the need to resort to the doctrine of anticipatory self-defense.¹⁹⁵ While this would be an alarmingly brief window of time during which to fend off a vessel suspected of being on a terrorist mission, if the United States possesses the ability to respond within that last hour, it is a window, a “moment,” nonetheless.¹⁹⁶

Also, as the self-defensive actions taken in anticipation must be proportional to the threat allegedly necessitating a response, opportunities short of forcefully boarding the non-consenting ship would have to be considered.

¹⁹¹ This is yet another example of a maritime event leading international law through some of its most important developments which control events having no relationship to oceans or rivers. See *supra* Part II.A. and note 29.

¹⁹² 29 B.F.S.P. 1137-381 and 30 B.F.S.P. 195-96.

¹⁹³ *Id.*

¹⁹⁴ See Barry, *supra* note 48, at 322. Proportionality is always a requirement of international law as a matter of *jus in bello*. It was one of the cardinal marks used by St. Augustine of Hippo as he devised his Just War Theory. See JOHN M. MATTOX, SAINT AUGUSTINE AND THE THEORY OF JUST WAR 60 (2006). In this context, however, it has the particular meaning that the anticipatory use of force must be proportional to the conduct which necessitated it. The conventional use of the term “proportionality” implies a limitation on gruesome or highly retributive belligerent conduct. This limited use of the word, however, would require the cessation of belligerency immediately upon the end of the threat which necessitated it.

¹⁹⁵ See *supra* Part III.A.

¹⁹⁶ The United States can raise an effective counterargument where the particulars of the intelligence threat reporting suggest the vessel contains weaponry that can cause damage to the U.S. Homeland from some distance at sea. Where the threat reporting is of a less pressing nature, e.g., where the alleged plot involves only smuggling precursor material or operatives into the U.S., there seems to be no showing of necessity sufficient to justify stopping the ship before it enters the jurisdictional seas of the United States.

For example, an inbound vessel that the United States suspects as a threat would have to be ordered to (and refuse to) divert before a high-seas boarding is justified under the doctrine of anticipatory self-defense. Where the ship complies, there is no longer a necessity to infringe upon the sovereignty of the ship's flag-state. Where the ship refuses, and continues to sail toward a United States port into which it has been denied permission to enter, the justifications of anticipatory self-defense become markedly stronger.

G. Admiralty Criminal Jurisdiction

Admiralty criminal jurisdiction is all too often left out of discussions of ship boarding authority, particularly where states may seek to assert this jurisdiction on the high seas.¹⁹⁷ This is unfortunate, because in light of existing U.S. statutory law, it is something of an 800-pound gorilla in the room of high-seas freedoms. Congressional permissions are broad, but some may cross the thresholds established by international customary and treaty law. Furthermore, U.S. constitutional law may impose some restrictions on this form of jurisdictional exercise, though it is much less likely to do so in the maritime domain than with shoreside applications of constitutional criminal procedure.

1. Jurisdiction and International Law

This article has already implicitly considered several aspects of jurisdiction over criminal acts at sea.¹⁹⁸ Under international law, a flag state has full jurisdiction, which includes criminal jurisdiction, over vessels of its own flag anywhere in the world.¹⁹⁹ Also, for certain crimes which violate peremptory norms of international law, criminal jurisdiction may be universally effected.²⁰⁰ That is, any state may enforce against, and then adjudicate,²⁰¹ the

¹⁹⁷ *E.g.*, Hodgkins, et al., *supra* note 48; Barry, *supra* note 48; and Wilson, *supra* note 23.

¹⁹⁸ *See supra* Part II.A.

¹⁹⁹ *See id.*, and *supra* note 28 (noting UNCLOS and REST. (THIRD) OF FOREIGN RELATIONS LAW provisions on jurisdiction). As was stated in these references, this jurisdiction over a state's own ships is commonly described as flowing from the territorial principle of international law, although it is technically an independent basis of jurisdiction. *Id.*

²⁰⁰ *See supra* Part III.D (describing the universality principle).

²⁰¹ Three categories of "jurisdiction" are distinguished in international law, the jurisdiction to prescribe (i.e., legislate), to adjudicate (i.e., judge), and to enforce (i.e., execute). REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, at § 401. However, they often run together. If a state has the jurisdiction to prescribe, *id.* at §§ 402, 403, then it may also employ reasonably related nonjudicial-enforcement measures. *Id.* at § 431. *See id.* comments a ("the fact that [a state] cannot effectively exercise judicial jurisdiction with respect to a person does not preclude enforcement through nonjudicial means"), and e.iv. ("In situations requiring urgent action, enforcement measures may be implemented prior to opportunity to be heard, and in exceptional circumstances even without

“universal crimes” of piracy, illegal broadcasting, transporting of slaves, or trafficking in narcotics, no matter the flag or location of the allegedly perpetrating vessel.²⁰²

These forms of jurisdiction are granted by international law; i.e., the jurisdiction exists apart from any state’s municipal law²⁰³ granting jurisdiction. Admiralty criminal law jurisdiction, however, can have as its source both international law principles and federal statutory grants.²⁰⁴ As international law generally prohibits municipal courts from exercising jurisdiction over extraterritorial acts done by foreign nationals, the United States must identify grounds under international law to validate statutory assertions of criminal jurisdiction over extraterritorial foreign ships.²⁰⁵ To this end, the grants of authority from Congress allowing for extraterritorial admiralty criminal jurisdiction would have to be justified by one of several international law theories: the objective territoriality principle, the passive personality principle, and the protective principle.²⁰⁶

prior notice. For example, it may be necessary to ground an airplane or to exclude a drug believed to be unsafe before a full investigation can be made.”).

²⁰² That the United States could board a foreign flag ship without consent in order to enforce the international crime of piracy, i.e., that it has this enforcement jurisdiction, follows from the principle that piracy is a universal crime whose enforcement obligation rests *erga omnes*. As such, the flag state could not maintain a sovereign interest in shielding the conduct or the criminals from foreign enforcement. *See supra* Part III.D.

²⁰³ The term “municipal law” refers to a particular state’s internal laws, as distinct from principles of international law. BLACK’S LAW DICTIONARY 1043 (8th ed. 2004).

²⁰⁴ *See* 18 U.S.C. § 7 (2000). As such, conflict of laws analysis will need to be undertaken where a statutory grant of jurisdiction over a foreign ship conflicts with an international proscription of that same jurisdiction. *See* Schoenbaum, *supra* note 18, at § 3-12.

²⁰⁵ *See Akehurst’s, supra* note 34, at 110.

²⁰⁶ Admiralty criminal law also concerns itself with jurisdiction over criminal acts that occur within the territorial seas, but only where those acts have an effect within the coastal state’s shoreline. This limitation of jurisdiction to only those acts with an effect ashore is based on international comity, however, and not a requirement of international law. *Mali v. Keeper of the Common Jail of Hudson County, N.Y.*, 120 U.S. 1, 12 (1887) (“And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.”). Therefore, this principle of admiralty criminal law is only a minor qualification to the near-plenary power a threatened coastal state would have to conduct a boarding within its territorial seas that is discussed *supra*, Part III.A. At any rate, an allegation of an unfolding terrorist plot would undoubtedly involve the “peace of the port.” *See also* 22 C.F.R. 265 (“When an offense is committed aboard a merchant vessel in the port or territorial waters of a nation other than the nation of registry, but does not involve the peace of the port, such offense is usually left by local governments to be adjusted by officers of the vessel and the diplomatic or consular representatives of the nation of registry. In the case of vessels of the United States, the right to protection against intervention by a foreign government in this class of cases is safeguarded in many areas by a treaty

2. Objective Territoriality, Passive Personality and Protective Principles

Congress has granted broad federal jurisdiction over certain criminal acts²⁰⁷ on the high seas, including aboard foreign-flagged ships, by creating the “special maritime and territorial jurisdiction” of the United States.²⁰⁸ Maritime terror-related activities considered in this paper would be U.S. municipal crimes subject to U.S. jurisdiction even though they occur on the high seas,²⁰⁹ whether they are the attempted illegal importation of weapons of mass destruction,²¹⁰ the attempted illegal immigration of terrorist operatives,²¹¹ or the intended use of a commandeered ship as a weapon.²¹² Thus, at least under U.S. municipal law, federal jurisdiction exists over any ship alleged to be engaged in any of these

of friendship, commerce and navigation or by a consular convention between the United States and the foreign government concerned. Even where no treaty or convention exists, the local foreign government will usually refrain from intervening in such cases on the basis of comity between nations.”); ROBERT FORCE & MARTIN J. NORRIS, *THE LAW OF SEAMEN* § 10:2 (5th ed. 2003) (describing the question of whether jurisdiction is in the flag-state or the territorial-sea state as “vexing,” and concluding that “[i]t would appear that jurisdiction is concurrent and the local sovereign may act unless it chooses to yield”).

²⁰⁷ Certain federal crimes incorporate the definition of “special maritime jurisdiction,” 18 U.S.C. § 7 (2000), into their definition of the proscribed offense. *E.g.*, 18 U.S.C. § 2332b prohibits such things as creating the substantial risk of serious bodily injury to any person within the United States, where the offense in question transcends national boundaries and occurs within the “special maritime and territorial jurisdiction of the United States.” An effect within the United States, where the conduct occurs on the high seas, would thus meet the offense elements of this section.

²⁰⁸ 18 U.S.C. § 7 (stating that “[t]he term “special maritime and territorial jurisdiction of the United States,” as used in this title, includes: (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.”). *See also* Schoenbaum, *supra* note 18, at § 3-12.

²⁰⁹ *E.g.*, 18 U.S.C. § 2332b (Acts of terrorism transcending national boundaries) prohibits such things as creating the substantial risk of serious bodily injury to any person within the United States, where the offense in question transcends national boundaries and occurs within the “special maritime and territorial jurisdiction of the United States.” An effect within the United States, where the conduct occurs on the high seas, would thus meet the offense elements of this section. *See generally* 18 U.S.C. ch. 113B (Terrorism).

²¹⁰ 18 U.S.C. § 2332b. *See also* 18 U.S.C. § 831 (Prohibited transactions involving nuclear materials).

²¹¹ 18 U.S.C. § 2332b.

²¹² 18 U.S.C. § 2332b; *see also* 18 U.S.C. § 2332f (Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities) (tying jurisdiction not to the “special maritime and territorial jurisdiction of the United States” *per se*, but, *inter alia*, to any offense, including attempts, occurring outside the United States where “a victim is a national of the United States”).

terrorist activities – the 800-pound gorilla. Several theories exist to support the international law permissibility of these authorizations of extraterritorial jurisdiction by the U.S. Congress.

First, this broad grab of jurisdictional authority could be justified under the “objective territoriality” principle, which maintains that a government may exercise extraterritorial jurisdiction over criminal offenses when the conduct could have a substantial effect within that government’s territory, and the exercise is not unreasonable.²¹³ “Objective territoriality” is opposed to “subjective territoriality.” These two principles combine to provide that whether a crime originates in *or has its effects in* a given state, that state may exercise jurisdiction over the perpetrators.²¹⁴ Thus the perpetrator of a shooting across a border would be the subject of dual criminal jurisdiction. This is the primary justification under international law of many U.S. terrorism offenses with extraterritorial reach. For example, 18 U.S.C. § 2332b proscribes, *inter alia*, conspiring to damage any real or personal property “within the United States,” even if the offense is committed on the high seas. In the context of violent crimes, this application of the effects doctrine is fairly uncontroversial under international law as a justification of extraterritorial jurisdiction.

Alternately, Congress can justify its claim of extraterritorial criminal jurisdiction under the “passive personality” principle of international law. This principle allows for extraterritorial jurisdiction when an alleged crime is committed against a national citizen of the United States.²¹⁵ It is premised on the duty of a state to protect its nationals no matter where they are located. This rationale is at work, for instance, in 18 U.S.C. § 2332f, which grants jurisdiction to federal courts for extraterritorial terrorist conduct, including attempts crimes, where a victim of the crime is a national of the United States.²¹⁶

Finally,²¹⁷ Congress’s claim of municipal criminal jurisdiction over extraterritorial terrorism acts can be justified under the “protective” principle.

²¹³ REST. (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 35, at §§ 402 and 403; *accord* Schoenbaum, *supra* note 18, at § 3-12 (147), citing *U.S. v. Marino-Garcia*, *supra* note 33; and *United States v. Pizdrint*, 983 F.Supp. 1110 (M.D. Fla. 1997).

²¹⁴ *Akehurst’s*, *supra* note 34, at 110-111.

²¹⁵ See Schoenbaum, *supra* note 18, at § 3-12, citing 18 U.S.C. § 7(8) (further defining the “special maritime and territorial jurisdiction of the United States” to include, “[t]o the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States *with respect to an offense committed by or against a national of the United States.*” (emphasis added)).

²¹⁶ See *infra*, note 220 (describing the passive personality principle).

²¹⁷ The universality principle, *supra* Part III.E, would make up the fourth of these principles that justify extraterritorial jurisdiction.

This principle holds that a state may assert jurisdiction over any person whose conduct threatens the state's internal security, proper functioning, or existence.²¹⁸ Such conduct includes plots to overthrow the government, to spy on it, or to counterfeit its currency.²¹⁹ It would also include ideologically motivated terrorism plots by state or non-state actors against the U.S. Government.

But, the difference between the passive personality and the protective principles is subtle and perhaps irrelevant. It is sufficient to note that principles of extraterritorial jurisdiction for the sake of protecting the territory and nationals of the United States have been incorporated into U.S. statutory law and accepted by U.S. courts as valid.²²⁰ While the principles allowing the assertion of extraterritorial jurisdiction are not without controversy, the eviscerating effect their application has on flag-state sovereignty and the principle of freedom should not be missed. Lastly, the motivated United States decision-maker can take some comfort in applying even the most controversial of these principles from the famous *Ker-Frisbie* doctrine, which maintains that the illegality of an arrest does not defeat jurisdiction at international law.²²¹ In a "close call," a facially valid argument justifying imposing on a foreign flag-state's sovereignty, and the ability to later prosecute alleged perpetrators, may be an Administration's winning situation all around.²²²

²¹⁸ *Akehurst's*, *supra* note 34, at 111-112. *Accord* Damrosch et al., *supra* note 23, at 1090-1091. *See* U.S. v. Pizdrint, *supra* note 213, and U.S. v. Marino-Garcia, *supra* note 33 ("Jurisdiction will lie where a nexus exists between a foreign vessel and the nation seeking to assert jurisdiction").

²¹⁹ *Akehurst's*, *supra* note 34, at 111-112.

²²⁰ *See, e.g.*, United States v. Marino-Garcia, *supra* note 33 ("under the objective [territorial] principle, a vessel engaged in illegal activity intended to have an effect in a country is amenable to that country's jurisdiction," citing REST. (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 18 (*now* REST. (THIRD) § 402(1)(c))). "Similarly, the protective principle allows nations to assert jurisdiction over foreign vessels on the high seas that threaten their security or governmental functions," citing *id.* at § 33 (*now* REST. (THIRD) § 402(3))). "Jurisdiction may also be obtained under the passive personality principle over persons or vessels that injure the citizens of another country," citing, *inter alia*, United States v. Layton, 509 F.Supp. 212, 216 n.5 ("Passive personality jurisdiction is one of the bases for extra-territorial jurisdiction which is cited in the case law without any suggestion that it should not be relied upon by the courts."). *Cf.* Rivard v. United States, 375 F.2d 882 (5th Cir. 1967) (same).

²²¹ *Frisbie v. Collins*, 342 U.S. 519 (1952) and *Ker v. Illinois*, 119 U.S. 436 (1886).

²²² *See infra* Part IV.A and B.

3. U.S. Constitutional Limitations on Admiralty Criminal Jurisdiction

Searches and seizures of ships at sea are not free from the reach of the U.S. Constitution, even if they are otherwise valid under international law.²²³ However, the protections offered by the Constitution, particularly the Searches and Seizures Clause of the Fourth Amendment,²²⁴ have less of an impact on law enforcement operations at sea than they do ashore.²²⁵

Congress has granted the U.S. Coast Guard broad authority to stop, examine, search, and arrest any vessel “upon the high seas and upon waters over which the United States has jurisdiction, for the prevention, detention, and suppression of violations of laws of the United States.”²²⁶ This broadest possible grant of jurisdiction includes foreign-flagged vessels on the high seas. Courts have long since accepted that the U.S. Coast Guard has plenary boarding power over ships at sea for the purposes of conducting documentation and safety inspections.²²⁷ For these inspections (vice searches), the Fourth Amendment does not require probable cause, a warrant, or any suspicion of criminal activity.²²⁸

However, if the boarding is premised on suspicions of terrorism-related crimes, the Fourth Amendment is not so ineffectual. While the U.S. Court of Appeals for the Ninth Circuit has held that the Fourth Amendment does not extend to foreign-flagged vessels on the high seas,²²⁹ the Second Circuit Court has assumed the opposite, without explicitly ruling on the issue.²³⁰ Still other courts have adopted a middle way for searches and seizures on the high seas. For instance, the Fifth Circuit Court has required only a demonstration of “reasonable suspicion” of criminal conduct, the standard applied in 14 U.S.C. §

²²³ See, e.g., *United States v. Streifel*, 665 F.2d 414 (2nd Cir. 1981) (holding that boarding consent given by flag-state was not an effective third-party consent for fourth amendment purposes).

²²⁴ U.S. CONST. amend. IV.

²²⁵ Schoenbaum, *supra* note 18, at § 3-12.

²²⁶ 14 U.S.C. § 89(a) (Coast Guard Enforcement Statute).

²²⁷ *Id.*, citing *inter alia*, *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978); *United States v. Liles*, 670 F.2d 989 (11th Cir. 1982); *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); and *United States v. Odneal*, 565 F.2d 598 (9th Cir. 1977). This power exists over U.S.-flagged vessels worldwide, and over foreign-flagged vessels who enter waters subject to U.S. jurisdiction, *see supra* Part III.A.

²²⁸ *Id.*

²²⁹ *United States v. Davis*, 905 F.2d 245, 251 (9th Cir. 1990) (extending the holding of *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that the Fourth Amendment does not apply to searches and seizures of nonresident aliens abroad, to include nonresident aliens on the high seas).

²³⁰ *United States v. Streifel*, 655 F.2d 414 (2^d Cir. 1981) (conducting fourth amendment “Terry stop” analysis to foreign ship seized by U.S. Coast Guard at sea).

89(a),²³¹ as opposed to the “probable cause” standard which appears in the amendment itself. But even if a court were inclined to strictly apply the Fourth Amendment to ships at sea, the exigent-circumstances doctrine²³² may cover aggressive boarding techniques where the U.S. Coast Guard boards a foreign ship based upon intelligence threat reporting of an impending terrorist attack or smuggling operation.

V. CONCLUSION

While the principle of freedom generally prohibits state boardings of foreign ships at sea, there is clear authority to board a foreign-flagged ship based on intelligence terrorism threat reporting when it is within the United States’ territorial sea or contiguous zone, or when the master or flag-state has consented. Beyond these fairly clear instances, however, the legal bases for such boardings are still being developed on the diplomatic front.

The tension between the law of the sea’s principle of freedom and the United States’ interests in self-protection from maritime threats will continue to drive efforts such as the PSI and bilateral ship boarding agreements. The United States must continue its advocacy in the international arena of a customary law against terror-related uses of the seas. If this can be kindled into a preemptory norm, boardings of foreign-flagged vessels may become permissible. The U.S. should also be prepared to seek U.N. Security Council authorization where the circumstances of a particular threat allow for such a time-consuming process. Lastly, invoking the doctrine of anticipatory self-defense remains viable *in extremis*, but certainly could require the expenditure of political capital. To avoid this imposition upon another state’s sovereignty, the United States should accede to the UNCLOS, to be in a position to negotiate with fellow members to add “vessels engaged in terror-related activities” to the list of activities already excepted from the principle of freedom. With continued diplomatic efforts, the decision of choosing preemption *or* respect for flag-state sovereignty will not have to be made in the event of a terror-related threat.

²³¹ *United States v. Williams*, 617 F.2d 1063, 1088 (5th Cir. 1980).

²³² *See Mincy v. Arizona*, 437 U.S. 385, 392-393 (1978) (“Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid.”), and *Terry v. Ohio*, 392 U.S. 1 (1968) (same).

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