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

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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

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¹ William Shakespeare, MacBeth, act 4, sc. 1, referring to the monarch’s crown.
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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.
ubiquitous among developed nations’ ports, today’s captain may lose more sleep over administrative burdens than over pirates plying the Strait of Malacca. However, when transiting outside of seas subject to the jurisdictional control of coastal states, the merchant mariner 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, 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-state 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. 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 she 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

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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. 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.

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 ships 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, the pressure on lawmakers, customs inspectors, and coast guard officials to prevent the loss of even an hour is tremendous. On the other hand, the threat of terrorist attacks from the sea,

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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.” 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, leading to high-seas boardings of threatening ships, as opposed to a constricting overall security posture that slows all maritime commerce.

II. FLAG-STATES, TERRITORIALITY & NATIONALITY

A. Steel, Soil and “Nationality”

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


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 unsuspicious 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

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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 generally Schoenbaum, supra note 18, § 1-2 to § 1-4, and LORI F. DAMROSCHE 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.


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,\textsuperscript{30} and most significantly for present purposes, exercise sovereign jurisdiction over the ship wherever it travels in the world.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{35} It arises also from the oddity

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\textsuperscript{30} SOLAS, \textit{supra} note 5.

\textsuperscript{31} UNCLOS, \textit{supra} note 8, at art. 94 (Duties of the Flag State).

\textsuperscript{32} \textit{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”). \textit{See also} Schoenbaum, \textit{supra} note 18, at § 2-18.

\textsuperscript{33} \textit{See} Wilson, \textit{supra} note 25, at 191. \textit{Cf.} 46 U.S.C. App. § 1903(c)(1)(A) and (2) (2000) \textit{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)).

\textsuperscript{34} \textit{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 \textit{The Schooner Exchange v. McFadden}, 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.” \textit{See also} PETE MALANCIUK, \textit{AHEURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW} 109 (7th ed. 1997) [hereinafter \textit{Akehurst’s}].

\textsuperscript{35} This word-concept fallacy of relating a ship’s “nationality” to the “nationality principle” of international law is prevalent. \textit{See, e.g.}, Nathaniel Kunkle, \textit{The Internal Affairs Rule and the International Law of Stateless Vessels} at 183-84 (2009); \textit{Akehurst’s} \textit{supra} note 34, at 288–289.

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that the jurisdictional meaning of ships’ “nationality” refers to their varying, metaphorical 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)).


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).