

## 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

#### I. INTRODUCTION

In December 2003, the United States Navy intercepted and seized a small vessel near the Strait of Hormuz in the Persian Gulf.<sup>1</sup> Found aboard were nearly two tons of illicit drugs,<sup>2</sup> and more importantly to the ongoing war on terror, three al Qaeda suspects.<sup>3</sup> The seizure occurred in a strait used for international navigation, as that term is defined by the United Nations Convention on the Law of the Sea<sup>4</sup> (Law of the Sea Treaty), where “all ships and aircraft enjoy the right of transit passage, which shall not be impeded.”<sup>5</sup>

A year earlier, on December 9, 2002, two Spanish Navy vessels intercepted and boarded a North Korean cargo ship<sup>6</sup> on the high seas,<sup>7</sup>

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1. See Matt Kelley, *U.S. Nets Drug Boat with Terror Suspects*, CHI. TRIB., Dec. 20, 2003, at C3.

2. See *id.*

3. See *id.*

4. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter Law of the Sea Treaty]. The United States is a signatory to the Law of the Sea Treaty, but has not ratified the Treaty. The U.S. has agreed, however, to apply the Treaty provisionally. See *Dep't of State Dispatch Supplement*, Feb. 1995, vol. 6, no.1.

5. Law of the Sea Treaty, *supra* note 4, art. 38(1). “Transit passage” is defined as “the exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” *Id.* art. 38(2).

6. See Thom Shanker, *Threats and Responses: Arms Smuggling; Scud Missiles Found on Ship of North Korea*, N.Y. TIMES, Dec. 11, 2002, at A1.

7. The “high seas” is defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state.” Law of the Sea Treaty, *supra* note 4, art. 86. See also Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, at art. 1 [hereinafter High Seas Convention].

600 miles off the coast of Yemen. Hidden beneath cargo, boarding crews discovered a stockpile of Scud missiles. It was not known at the time of the interdiction whether the missiles were headed for Yemen, or whether they were going to be bought by a terrorist organization.<sup>8</sup> Although the North Korean freighter had been tracked by U.S. intelligence up to the point of interdiction,<sup>9</sup> the Spanish Navy justified its boarding of the vessel on grounds that it was not flying a flag and its national markings were obscured by paint.<sup>10</sup> After the initial interdiction and seizure, however, the vessel was permitted to continue to its final destination—Yemen—when it was discovered through consultations with the Yemeni president that his government had legally purchased the missiles.<sup>11</sup> The White House conceded at that time that there was no provision under international law that prohibited Yemen from purchasing conventional missiles from North Korea, and although the initial seizure was characterized as legal, further confiscation of the cargo was not.<sup>12</sup>

This high profile interdiction by the Spanish Navy highlights its continuing mission to search for and seize on the high seas al Qaeda operatives who may be fleeing Afghanistan and other nations in southwest Asia for the Horn of Africa,<sup>13</sup> as well as related terrorist contraband.<sup>14</sup> More broadly, the effort of the Spanish Navy underscores the ongoing effort by several nations to combat the proliferation of weapons of mass destruction (WMD) by interdicting the transfer of these weapons, their delivery systems and related materials on the oceans and to a lesser extent, in the air. The Proliferation Security Initiative<sup>15</sup> (PSI)

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8. See Shanker, *supra* note 6.

9. See *id.*

10. See *id.* Under the Law of the Sea Treaty a warship that encounters a foreign merchant vessel on the high seas is not justified in boarding it unless there are reasonable grounds for suspecting “that, . . . though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.” Law of the Sea Treaty, *supra* note 4, art. 110(1)(e). See also High Seas Convention, *supra* note 7, art. 22(1)(c). The right to board a foreign vessel in such a circumstance is limited, and may only be undertaken to verify the nationality of the ship in question. See *id.*

11. See David E. Sanger & Thom Shanker, *Threats and Responses: War Mat Riel; Reluctant U.S. Gives Assent For Missiles to Go to Yemen*, N.Y. TIMES, Dec. 12, 2002, at A1.

12. See Press Release, White House Press Briefing by Ari Fleischer (Dec. 11, 2002), available at <http://www.whitehouse.gov/news/releases/2002/12/20021211-5.html>.

13. See generally Michael R. Gordon, *Threats and Responses: Allies; German and Spanish Navies Take On Major Role Near Horn of Africa*, N.Y. TIMES, Dec 15, 2002, § 1 at 36 (discussing the role European navies are playing in the area of the Indian Ocean to combat terror).

14. See *id.*

15. The Proliferation Security Initiative was announced by President George W. Bush on May 31, 2003. See President George W. Bush, Remarks by the President to the People of Poland (May 31, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

is an effort by a group of eleven nations<sup>16</sup> that seeks to establish a set of principles based on international law that would permit, *inter alia*, the seizure in internal waters, territorial waters, or on the high seas of a foreign State's vessels if reasonably suspected of transporting WMD or related material.<sup>17</sup>

The strategy articulated by the PSI is criticized, *inter alia*, on ground that it contravenes relevant treaty law.<sup>18</sup> This Note offers a customary international law defense to those criticisms of the PSI.<sup>19</sup> Specifically, this Note discusses the relationship between treaty law and customary international law to show that they may exist in concert, and that custom is not always trumped by treaties. Part III establishes that freedom of navigation is a limited right and that in certain circumstances accommodates the interdiction and seizure of foreign vessels. Part IV examines the right of seizure of a foreign State's ship as a matter of the customary international law right of self-defense, particularly through the doctrine of anticipatory self-defense. Finally, part V will examine the PSI's Statement of Interdiction Principles in order to reconcile them with the principles of customary international law, and also make recommendations in order to strengthen the PSI's ability to suppress the transfer by sea of WMD.

## II. CUSTOMARY INTERNATIONAL LAW

### A. Defined

Customary international law has two distinct component parts: It is the general practice of states, and must also be accepted as law.<sup>20</sup> Both must be established in order for a new rule of custom to emerge. The first component part (i.e. general practice) may be established even in

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16. The participating nations are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the United Kingdom, and the United States. See Press Release, United States Press Secretary, Statement on Proliferation Security Initiative (Sept. 4, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030904-10.html>.

17. See Press Release, Proliferation Security Initiative, Statement of Interdiction Principles, available at <http://www.whitehouse.gov/news/releases/2003/09/20030904-11.html>.

18. See, e.g., Law of the Sea Treaty, *supra* note 4, art. 92 (ships sailing under the flag of one state are subject to that State's exclusive jurisdiction); High Seas Convention, *supra* note 7, art. 6 (stating the same).

19. Customary international law is defined as the general practice of states accepted as law. See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1060 [hereinafter ICJ Statute].

20. See *id.*

the absence of uniform acceptance among all States.<sup>21</sup> “[G]eneral practice must be general, but it need not be universal.”<sup>22</sup> The second element of customary international law is more plainly defined, and it is said, more critical to the determination of the existence of customary international law.<sup>23</sup> It requires a state’s acceptance of the general practice of states as *legally binding* on its internal and external relations.<sup>24</sup> This may be evinced by analyzing national legislation or court decisions regarding legal issues of international concern.<sup>25</sup> When the two elements of customary international law are satisfied, the rule that emerges is considered to have general application upon all states,<sup>26</sup> unlike treaties which generally only bind those states party to the treaty, and might never bind all states.<sup>27</sup>

### B. Customary International Law in the U.S.

In an early expression of the principle of customary international law in the United States, the Supreme Court announced the rule that “[i]nternational law is part of our law. . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .”<sup>28</sup> In *The Paquete Habana*, the Court had to determine the legality under international law of the seizure of a Spanish fishing vessel as a prize of war<sup>29</sup> during the Spanish-American War. In determining that the vessel

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21. See Michelle M. Kundmueller, Note, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudolegislation*, 28 J. LEGIS. 359, 362 (2002).

22. *Id.*

23. See Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 641 (2000).

24. See *id.* (“*opinio juris* . . . is the explanation for why a nation acts in conformity with a [customary international law] norm.”). See also MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 96 (2d ed. 2001) (“Ordinarily in positivist theory, it is said that customary international law is based on state practice and *opinio juris*, the belief that states act in a certain way because legally bound to do so.”); RESTATEMENT OF FOREIGN RELATIONS LAW § 102(2) (1986) [hereinafter RESTATEMENT] (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

25. Explicit evidence of *opinio juris* is not necessary, and may be inferred from either acts or omissions of a state. See RESTATEMENT *supra* note 24, § 102, cmt. c.

26. See JANIS & NOYES, *supra* note 24, at 87.

27. See *id.*

28. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Court uses the term “law of nations” instead of “customary international law”; the terms are interchangeable.

29. A vessel seized at sea during time of war is liable to be appropriated as enemy property. This Note does not address the issue of the seizure of a foreign State’s vessel as a prize of war as an

was exempt from capture as a prize, the Court held that the “general consent of the civilized nations of the world, . . . *independently of any express treaty* or other public act,”<sup>30</sup> established the international law rule that must be enforced by the courts of law in the appropriate jurisdiction.<sup>31</sup>

To justify this ruling, the Court analyzed the “ancient usage among civilized nations”<sup>32</sup> regarding the limitation on the right to seize fishing vessels as prize. In particular, the Court looked to early acts of governments on the subject, to include orders by King Henry IV to his admirals in 1403 and 1406,<sup>33</sup> a treaty concluded in 1521 between Emperor Charles V and Francis I,<sup>34</sup> French and Dutch edicts in 1536,<sup>35</sup> French ordinances concerning the admiralty of 1543 and 1584,<sup>36</sup> a royal order of Louis XVI of 1780,<sup>37</sup> a treaty between the United States and Prussia of 1785,<sup>38</sup> and finally, orders from the Navy Department to its commanders during the Mexican-American War.<sup>39</sup> Importantly for the determination of what customary international law means in the United States, the Court also cited numerous legal jurists who had opined on the issue of the legality of seizure of fishing vessels during time of war.<sup>40</sup>

The ruling in *The Paquete Habana* that “international law is part of our law”<sup>41</sup> has been repeatedly cited by U.S. courts to uphold that proposition.<sup>42</sup> Given the analysis by the Court in reaching that decision, it is evident that the historic actions of foreign governments<sup>43</sup> and the works of legal jurists has a major influence on the determination of customary international law, and therefore, whether the actions of the United States in its foreign relations are considered legal under international law.<sup>44</sup>

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international law right under the laws of war. For a discussion of the conditions necessary to legitimate the capture of a vessel at sea during time of war see *The Prize Cases*, 67 U.S. 635 (1863).

30. 175 U.S. at 708 (emphasis added).

31. *See id.* at 700.

32. *Id.* at 686.

33. *See id.* at 687.

34. *See id.*

35. *See id.* at 688.

36. *See id.* at 689.

37. *See id.* at 689-90.

38. *See id.* at 690.

39. *See id.* at 696.

40. *See id.* at 700-09.

41. *Id.* at 700.

42. *See* Goldsmith & Posner, *supra* note 23, at 651.

43. The Court in *The Paquete Habana* limited these to “civilized nations.” 175 U.S. at 700.

44. *See* RESTATEMENT, *supra* note 24, at § 103(2).

### C. *Treaty Law v. Customary International Law*

Article 38 of the Statute of the International Court of Justice<sup>45</sup> lists the sources of law that the International Court of Justice<sup>46</sup> (ICJ) is to apply when deciding a case before it, including treaties;<sup>47</sup> customary international law;<sup>48</sup> general principles of law;<sup>49</sup> and the works of legal scholars.<sup>50</sup> But is this a hierarchy that must be followed by the court? Are treaties stronger source of existing international law because they are mentioned first, or does customary international law maintain a place of prominence among the sources of international law?<sup>51</sup> The issue of hierarchy may initially seem to be purely academic. Rather, the matter is of great import when it comes to judging the legality of the greatest expression of a state's sovereignty: the use of force.

In *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*,<sup>52</sup> commonly referred to as *Nicaragua v. United States*, the last case decided by the ICJ involving the issue of legality of the use of force by one state against another, the court was required to make a preliminary finding regarding the correct source of international law to apply to the case. Under Article 36(2), each state in the international system may accept jurisdiction of the ICJ as compulsory.<sup>53</sup> The acceptance of the U.S., however, removed from the jurisdiction of the court all "disputes 'arising under' the United Nations Charter and

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45. See ICJ Statute, *supra* note 19.

46. The ICJ's "function is to decide in accordance with international law such disputes as are submitted to it." *Id.* art. 38(1).

47. See *id.* art. 38(1)(a).

48. See *id.* art. 38(1)(b).

49. See *id.* art. 38(1)(c).

50. See *id.* art. 38(1)(d).

51. In the U.S., customary international law is listed first in the order of sources of international law. See RESTATEMENT, *supra* note 24, § 102(1)(a).

52. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). Nicaragua filed an application with the ICJ in 1984 contesting the legality of United States support for the *contras*, a rebel group inside Nicaragua that was opposed to the then-communist regime. Nicaragua also complained of more overt acts by the U.S., including the laying of mines in Nicaraguan territorial waters and the bombing of Nicaraguan ports and oil installations. The U.S. contended that its challenged actions were justified as a measure of collective self defense, in that it was assisting the governments of Honduras, Costa Rica and El Salvador in fighting rebels backed by the Nicaraguan government. See JANIS & NOYES, *supra* note 24, at 524. See also Akbar Sharif, Note, *Paradigm Shift: Contemporary Justifications for 'Adapting' The Precedent of the International Court of Justice in the Nicaragua Proceedings*, 8 NEW ENG. INT'L & COMP. L. ANN. 363, 364-68 (2002) (discussing the history of the communist regime of Nicaragua).

53. See ICJ Statute, *supra* note 19, art. 36(2). The term "compulsory" is misleading. A state may make reservations to its acceptance, thereby removing from consideration by the ICJ certain classes of cases.

Organization of American States.”<sup>54</sup> If the court accepted the U.S. reservation, it would “have no jurisdiction to determine whether the conduct of the United States constitute[d] a breach of those conventions,”<sup>55</sup> or so it was argued by the U.S. The court did not, however, consider this to be the end of the jurisdictional argument, and instead concluded “that it should exercise the jurisdiction conferred on it by the United States . . . to determine the claims of Nicaragua based upon customary international law.”<sup>56</sup> This point is of critical import in the consideration of the legality of the PSI’s Statement of Interdiction Principles, which at first glance may seem to contravene explicit provisions of multilateral treaties.<sup>57</sup>

### III. FREEDOM OF NAVIGATION ON THE HIGH SEAS, AND ITS LIMITATIONS

The general rule, under both treaty law and customary international law, is that a ship sailing on the high seas, and flying the flag of one state, is subject to the exclusive jurisdiction of that state.<sup>58</sup> The principle of exclusive flag-state jurisdiction and its correlative principle of freedom of navigation on the high seas<sup>59</sup> have a long legal history which developed over the course of several centuries through state practice, which has been accepted as legally binding. In other words, these principles are the codified versions of customary international law. This notion is expressed in both the Law of the Sea Treaty<sup>60</sup> and the High Seas Convention,<sup>61</sup> and it is this customary international law that helps to inform the treaty law when it comes to testing the legality of the seizure of a foreign State’s ship on the high seas. For this, a brief examination of the works of early legal jurists is appropriate, as not only

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54. 1986 I.C.J. at 97.

55. *Id.*

56. *Id.*

57. *See supra* note 18 and accompanying text.

58. *See* Law of the Sea Treaty, *supra* note 4, art. 92; High Seas Convention, *supra* note 7, art.

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59. *See* Law of the Sea Treaty, *supra* note 4, art. 87(1)(a).

60. *See, e.g., id.* at preamble. “*Believing* that the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations . . .,” and “*Affirming* that matters not regulated by this Convention continue to be governed by the rules and principles of general international law.” *Id.* (alteration in original).

61. “*The States Parties to this Convention, Desiring* to codify the rules of international law relating to the high seas . . .” High Seas Convention, *supra* note 7, at preamble (alteration in original).

are these works a source of law listed in the Statute of the ICJ,<sup>62</sup> but legal scholars have driven the development of the law of the sea since the sixteenth century. Next, this Note explores cases and legislation from the U.S. and several of the other members of the PSI in order to determine the general practice of these states, which are accepted as law.<sup>63</sup>

### A. *Freedom of Navigation*

The hallmark principle of modern international law of the sea, that the high seas are open to all states, has not always been the general state practice, and actually stands in stark contrast to the early practice of several western European states.<sup>64</sup> In the fifteenth century, the kingdoms of Sweden<sup>65</sup> and Denmark;<sup>66</sup> the city-states of Venice,<sup>67</sup> Genoa<sup>68</sup> and Pisa;<sup>69</sup> Britain;<sup>70</sup> and even the Pope<sup>71</sup> designated large areas of the sea to be under sovereign control. In many instances, tolls were levied on foreign ships in order to guarantee passage through these waters.<sup>72</sup> The cost and delay associated with such tolls became an impediment to the growing importance of maritime commerce and exploration.

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62. See ICJ Statute, *supra* note 19, art. 38(1)(d).

63. In determining the existence of customary rules of international law, the ICJ has held the following:

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.

Nicar. v. U.S., 1986 I.C.J. at 98.

64. See generally R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 204 (3d ed. 1999) (discussing the early practice of many Western European states making claims of sovereignty over areas of the sea).

65. See *id.*

66. See *id.*

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*

In response to the exclusion of the Netherlands from the East India trade,<sup>73</sup> the Dutch scholar Hugo Grotius published in 1609 his work *Mare Liberum*,<sup>74</sup> the first set of legal arguments that eventually gave rise to the concept of freedom of navigation on the high seas.<sup>75</sup> As *Mare Liberum* was written to support Dutch trade, Grotius's argument is first based on what he deemed the "unimpeachable axiom"<sup>76</sup> that "[e]very nation is free to travel to every other nation, and to trade with it,"<sup>77</sup> and the Portuguese, by prohibiting the right of the Dutch to do so, were committing an international law wrong against the Dutch.<sup>78</sup> In fact, Grotius even compared the hampering of maritime commerce by the Portuguese sovereign to piracy.<sup>79</sup>

Grotius further argued that no State could acquire legal title to the sea because historically the sea was the property of no single sovereign, but was rather the property of all.<sup>80</sup> Traditionally, all things were held in common, and ownership of property as it exists today, is based on occupation of that which once was held by all.<sup>81</sup> As such, Grotius argued that that which could never be occupied could never be the property of anyone;<sup>82</sup> and that which serves the "common use of all other persons, is today and ought in perpetuity to remain in the same condition as when it was first created by nature."<sup>83</sup> The oceans fell into this category, as "the sea can in no way become the private property of any one, because nature not only allows but enjoins its common use."<sup>84</sup>

Grotius continued, and reiterated his argument that "[b]y the law of nations the principle was introduced that the opportunity to engage in

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73. See generally Arvid Pardo, *The Law of the Sea: Its Past and Its Future*, 63 OR. L. REV. 7 (1984) (recounting a history of state claims of jurisdiction over the seas, from the practices of the Romans, through the early practices of Western European states, leading to the development of the doctrine of freedom of navigation).

74. *Mare Liberum* was originally published in Latin. The title, *Mare Liberum*, may be translated as *The Freedom of the Seas*. HUGO GROTIUS, *THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* (James Brown Scott ed., Oxford Univ. Press 1916) (1609).

75. See THOMAS A. CLINGAN, *THE LAW OF THE SEA: OCEAN LAW AND POLICY* 12 (1994).

76. GROTIUS, *supra* note 74, at 7.

77. *Id.*

78. See *id.* at 10.

79. "Is not that the very cause which for the most part prompts us to execrate robbers and pirates, namely, that they beset and infest our trade routes?" *Id.*

80. See *id.* at 22.

81. See *id.* at 25.

82. See *id.* at 27.

83. *Id.*

84. *Id.* at 30.

trade, of which no one can be deprived, should be free to all men.”<sup>85</sup> As all things were given to all men, and all things were not to be found everywhere, trade among nations arose as a necessity to feed the habits of men.<sup>86</sup> Freedom of trade, then, was based on the natural right of all nations and “cannot be destroyed . . . except by the consent of all nations.”<sup>87</sup> Grotius concluded his case for freedom of navigation on the high seas with a powerful message, underscoring the importance maritime trade had, and continues to have, on the growth and prosperity of nations: “Since these things are so, there need not be the slightest fear that God . . . or that even men will allow those to go unpunished who for the sake alone of private gain oppose a common benefit of the human race.”<sup>88</sup>

The doctrine espoused by Grotius is “so widely ingrained in international law that it no longer needs . . . supporting arguments.”<sup>89</sup> Although the doctrine of freedom of navigation is enshrined in the High Seas Convention<sup>90</sup> and the Law of the Sea Treaty,<sup>91</sup> it is not absolute. Presently, the doctrine of freedom of navigation stands for the proposition that “no State has the right to prevent ships of other States from using the high seas for any *lawful purpose*.”<sup>92</sup> In fact, Grotius even left this possibility open when he stated that freedom of navigation could not be destroyed, except by the consent of all nations.<sup>93</sup> Through state practice and *opinio juris*, it will be shown that states have limited this right significantly, and the right exists now through customary international law for states to interfere with foreign vessels on the high seas when it is in their national and international interests.

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85. *Id.* at 61 (citations omitted).

86. *See id.* at 61-62.

87. *Id.* at 64.

88. *Id.* at 75-76.

89. CLINGAN, *supra* note 75, at 12. *But see* Frank W. Newton, *Inexhaustibility As a Law of the Sea Determinant*, 16 TEX. INT'L L.J. 369 (1981) (detailing the arguments of the English jurist John Selden, who published *Mare Clausum* in response to Grotius and argued that the seas were subject to apportionment and the exercise of sovereignty by states. Selden's arguments were based largely on history, particularly the history of British apportionment of the seas, but also on the principle that the seas were exhaustible and required sovereign control in order to protect against depletion of resources).

90. *See* High Seas Convention, *supra* note 7, art. 2(1).

91. *See* Law of the Sea Treaty, *supra* note 4, art. 87(1)(a).

92. CHURCHILL & LOWE, *supra* note 64, at 205 (internal quotations omitted) (emphasis added).

93. *See supra* note 87 and accompanying text.

## B. *The Limitations on Freedom of Navigation*

### 1. Prohibition of Illicit Trade

*Church v. Hubbard*<sup>94</sup> is one of the earliest expressions in the U.S. of the notion that a nation may have the authority to protect itself from injury in some circumstances beyond the limits of its territorial sea.<sup>95</sup> Although the underlying dispute was by its nature wholly a matter of domestic concern,<sup>96</sup> the ruling of the Court regarding the rights of coastal states over foreign vessels has a relevant international law consequence. At issue was the legitimacy of the actions of the Portuguese authorities in seizing the American vessel beyond the limits of the territorial waters of the Portuguese colony of Brazil.<sup>97</sup> If this was an illegitimate exercise of jurisdiction, the plaintiff could recover from his insurance company the cost of the vessel.<sup>98</sup> In holding that the plaintiff could not recover the cost of its ship, Chief Justice Marshall articulated the customary international law rule of freedom of navigation, stating “the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*.”<sup>99</sup> The Chief Justice, however, expressed the limitation on this right:

[A nation’s] power to secure itself from injury, may certainly be exercised beyond the limits of its territory. . . . Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries . . . . If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.<sup>100</sup>

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94. 6 U.S. 187 (1804).

95. “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. . . . The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*.” Law of the Sea Treaty, *supra* note 4, art. 2 (1)–(3) (emphasis added).

96. The underlying action was one against an insurance company to recover for the loss of an American vessel, the *Aurora*, seized by Portuguese authorities for alleged illicit trade with a Portuguese colony. *See Himely*, 8 U.S. at 241.

97. *See Hubbard*, 6 U.S. at 187-89.

98. The two policies at issue contained exemptions for vessels seized as a result of illicit trade with the Portuguese. *See id.* at 187.

99. *Id.* at 234.

100. *Id.* at 234-35 (emphasis added).

Provided the seizure by the Portuguese was reasonable and necessary, and was undertaken pursuant to a law whose purpose was to protect against illegal activity,<sup>101</sup> the Court was willing to judge it as permitted under the rules of customary international law.

The case of *Rose v. Himely*<sup>102</sup> recognized two types of seizure of foreign vessels—first is that which is done in time of war and may be undertaken upon the high seas,<sup>103</sup> and, second, that which is pursuant to municipal legislation, and may only occur within the territorial waters of a state.<sup>104</sup> The *Rose* Court ruling that the seizure of a foreign vessel on the high seas is invalid if undertaken pursuant to municipal legislation,<sup>105</sup> contradicts the Court's earlier ruling in *Hubbart*. However, the cases are different. *Rose v. Himely* is distinguishable because it involved a defect of process,<sup>106</sup> rather than a violation of customary international law.

The dissenting opinion of Justice Johnson outlines the international law issues that the majority did not decide on, and characterizes the seizure of the American vessel as a matter of self-defense.<sup>107</sup> Justice Johnson recognizes the right of any nation to exclude all others from engaging in trade within its territories, and that this right exists both in time of war, and in time of peace.<sup>108</sup> At the time of seizure, France was in a state of war with her revolting colony, and corollary to the right of France to subdue that colony, she also had a right to exclude all other nations from granting assistance to the rebels.<sup>109</sup> According to Justice Johnson, “[w]hatever the great principle of self defence in its reasonable and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the oceans.”<sup>110</sup> Provided the exercise of self defense upon the high seas is undertaken in a reasonable

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101. *See id.* at 236.

102. 8 U.S. 241 (1807).

103. *See id.* at 279.

104. *See id.*

105. *See id.*

106. “The offense then alleged to have been committed by the [seized vessel], could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign . . .” *Id.* at 278.

107. The American schooner *Sarah* was seized by French authorities after trading with a rebel group on the island of St. Domingo. *Id.* at 241.

108. *See id.* at 288 (Johnson, J., concurring).

109. *See id.* at 289.

110. *Id.* at 287.

manner,<sup>111</sup> any seizure “may fairly be considered as having been made in conformity with the law of nations.”<sup>112</sup>

Both cases taken together articulate the principle that a coastal state may, through its sovereign power, exclude any and all foreign states from trading within its territory. In order to enforce these municipal laws, the right under customary international law exists to seize foreign vessels to prevent injury to the coastal state. This legal principle espoused by jurists has become state practice, as evidenced through national legislation, and constitutes a body of customary international law on the subject.

In the *Himely* dissent, Justice Johnson eluded to a statute of Great Britain that, subject to the reasonable exercise of self-defense,<sup>113</sup> permitted the seizure of foreign vessels if they approached a specified distance from the British coast with certain cargoes on board.<sup>114</sup> Known as the “hovering laws,”<sup>115</sup> this legislation was enacted in Great Britain to combat the rapid rise in smuggling from the sea that occurred in the eighteenth century.<sup>116</sup> The authority to seize foreign vessels under these laws was deemed by the House of Lords to be sanctioned by international law:

[T]he liberty which every nation enjoys, of searching, on suspicion of unlawful trade, the ships of foreigners that approach near to their coast without any necessity, is a liberty that is not only established by the law of nations, but is generally regulated by the particular laws or customs of each respective society.<sup>117</sup>

Speaking before Parliament the Earl of Illay continued:

[A]ll the precautions we could take . . . could not prevent that pernicious trade, and therefore we have . . . enforced and regulated the right we have by the law of nations, of searching . . . such foreign ships as approach our coasts, and give just cause for suspecting their being concerned in, or designed for carrying on any contraband trade.<sup>118</sup>

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111. *See id.*

112. *Id.* at 290.

113. *See supra* note 111 and accompanying text.

114. *See* 8 U.S. at 287-88 (Johnson, J., concurring).

115. The numerous “hovering laws” were consolidated in 1876. *See* An Act to Consolidate the Customs Laws, 1876, 39 & 40 Vict., c. 36.

116. *See generally* WILLIAM E. MASTERSON, JURISDICTION IN MARGINAL SEAS 31-37 (1929) (discussing the rise and increasing violence of smugglers in and near the coastal cities of Britain).

117. *Id.* at 29 (quoting the Earl of Illay, before the House of Lords, Feb. 22, 1739).

118. *Id.* at 30.

Although the original “hovering laws” of 1739 were repealed and consolidated in 1825,<sup>119</sup> the newly written laws still operated to prevent smuggling by permitting the seizure of foreign vessels, and many cases of seizure have been upheld by the British courts as being permissible under the rules of customary international law.<sup>120</sup>

In the U.S., early statutes dealing with the subject of trade appear to have been modeled after the British statutes.<sup>121</sup> In particular, Justice Johnson refers in his dissent to the Act of March 2, 1799.<sup>122</sup> In pertinent part, the statute reads that every ship “bound to any port or place in the United States”<sup>123</sup> may be boarded anywhere within four leagues, a distance seaward of the limit of the territorial sea at the time.<sup>124</sup> Speaking of the legislation in 1875, Secretary of State Fish noted near universal acquiescence to the American law, stating “there is no known instance of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.”<sup>125</sup>

Because no article in the Law of the Sea Treaty or the High Seas Convention addresses the issue of seizure of a foreign vessel for a violation of the municipal customs laws of a coastal state, the foregoing has demonstrated the general practice, accepted as law of two of the world’s largest naval powers.<sup>126</sup> As such, these practices support the principle that the freedom of navigation and the exclusive jurisdiction of

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119. *See id.* at 101.

120. *See id.* at 120-49. Certain cases include *Attorney General v. Schiers* (upholding the seizure of a foreign vessel for an act committed on the high seas beyond the statutory distance from shore, when the vessel later comes within that distance); *The Providence* and *Le Georges* (upholding the seizure of two French vessels roughly nine miles from shore after the French government made no protests); *L’Abondance* (upholding the seizure beyond the statutory distance for a crime that was committed within it). *Id.* (citations omitted).

121. *See Himely*, 8 U.S. at 288.

122. An Act to Regulate the Collection of Duties on Imports and Tonnage, 5 Cong. Ch. 22, 1 Stat. 627 (1799).

123. *Id.* at 646-47.

124. The limit of the territorial sea at that time was three miles from shore. One league is a measure of distance equal to about three miles; four leagues would be roughly twelve miles, or nine miles past the limit of the territorial sea—an area constituting the high seas. *See id.*

125. PHILIP C. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 80 (1927) (citation omitted).

126. The general practice component of customary international law can be created by only a few states, if they are the only states with the capability of entering into the practice. *See generally* Benjamin Langille, Note, *It’s “Instant Custom”: How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT’L & COMP. L. REV. 145 (2003) (arguing that state practice can create instant custom if there is an articulation of a principle, coupled with an act conforming to that articulation).

the flag state of a vessel are limited, and may instead be secondary to the right of a coastal state to enforce its domestic laws or protect itself from injury. Two more instances of state practice support this notion, the unique case of the suppression of the slave trade, and the prohibition on trafficking in illicit drugs.

## 2. Suppression of the Slave Trade

The Law of the Sea Treaty expressly prohibits the transportation of slaves.<sup>127</sup> Both the High Seas Convention and the Law of the Sea Treaty permit the boarding of a foreign vessel on the high seas if it is reasonably suspected of engaging in the slave trade,<sup>128</sup> but neither treaty states the existence of any enforcement measures permitted in order to suppress the trade. The only right that exists is for a warship to proceed to verify the nationality of the foreign ship. Only if the boarded vessel is of the same nationality as the warship<sup>129</sup> may it be seized for engaging in the slave trade, and only then if such an act is prohibited by the municipal law of the flag state in question. Other states may only report their findings to the proper authorities of the flag state.<sup>130</sup> According to international treaty law, slave trading is not analogous to the crime of piracy,<sup>131</sup> and does not impose a positive duty on all states to repress it.<sup>132</sup> Customary international law, which is incorporated into both the High Seas Convention and Law of the Sea Treaty,<sup>133</sup> may not support this principle, and instead may permit the seizure on the high seas of foreign vessels engaging in the slave trade.

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127. "Every State shall take effective measures to prevent and punish the transport of slaves in ships authorized to fly *its* flag and to prevent the unlawful use of its flag for that purpose." Law of the Sea Treaty, *supra* note 4, art. 99 (emphasis added). *See also* High Seas Convention, *supra* note 7, art. 13 (stating the same).

128. "Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that . . . the ship is engaged in the slave trade." Law of the Sea Treaty, *supra* note 4, art. 110(1)(b). *See also* High Seas Convention, *supra* note 7, art. 22(1)(b) (containing substantially similar language as the Law of the Sea Treaty).

129. *See* Law of the Sea Treaty, *supra* note 4, art. 110(2). *See also*, High Seas Convention, *supra* note 7, at art. 22 (2).

130. *See* CHURCHILL & LOWE, *supra* note 64, at 212.

131. *See id.*

132. The Law of the Sea Treaty requires that "[a]ll states shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Law of the Sea Treaty, *supra* note 4, art. 100 (emphasis added). *See also* High Seas Convention, *supra* note 7, art. 14 (containing language identical to the Law of the Sea Treaty).

133. *See supra* notes 62-63 and accompanying text.

The leading case in the U.S. regarding the principle of universality of jurisdiction over slave trading vessels is *United States v. The La Jeune Eugenie*.<sup>134</sup> Following a denunciation of slavery and the slave trade, Justice Story addressed the first question at issue in the case—whether the law of nations prohibited it.<sup>135</sup> In construing the law of nations on the issue, Justice Story looked to “general principles of right and justice,”<sup>136</sup> “customary observances and recognitions of civilized nations,”<sup>137</sup> and to the “conventional or positive law that regulates the intercourse between states.”<sup>138</sup> In examining the practice of states relating to the slave trade, Justice Story concludes that “there is scarcely a single maritime nation of Europe, that has not . . . pledged itself to promote its abolition.”<sup>139</sup>

While concluding that customary international law forbade the traffic in slaves, Justice Story rested his opinion that any state may rightfully seize a slave trading vessel on the ruling of the highest admiralty court in Britain.<sup>140</sup> In a case involving similar facts to *The La Jeune Eugenie*, the British court ruled that, although the slave trade had been abolished by the British legislature, there was no right consistent with international law that would permit the seizure of foreign vessels as a measure of enforcing that law on other nations.<sup>141</sup> As such, the British court was prepared to allow any owner of a vessel seized for engaging in the slave trade to offer proof that such an action was not prohibited by their national legislation.<sup>142</sup> The court recognized, however, that no person engaged in the slave trade could, upon principles of “universal law,”<sup>143</sup> have any right to be heard on such a claim.<sup>144</sup> The seizure, then, was upheld. Relying heavily on this case, Justice Story held “that any trade contrary to the general law of nations . . . may subject the vessel employed in that trade to confiscation.”<sup>145</sup>

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134. 26 F. Cas. 832 (C.C.D. Mass. 1822). The case involved an action against a French vessel that was seized off the coast of Africa for being involved in the slave trade there. *Id.*

135. *See id.* at 845.

136. *Id.* at 846.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.* at 847. The case Justice Story was referring to is *The Amedie*. *See The Amedie*, 12 Eng. Rep. 92 (1810).

141. 24 F. Cas. at 848.

142. *See id.*

143. *Id.*

144. *See id.*

145. *Id.* *But see* *The Antelope*, 23 U.S. 66 (1825). Chief Justice Marshall held that the slave trade was not universally prohibited, nor was it a violation of the law of nations. Marshall also denied that there was a right of visit and search of foreign vessels on the high seas if suspected of

British state practice in the nineteenth century supports the principle of a right to seize foreign vessels engaged in the slave trade in an effort to completely suppress it. In an analogous effort to the PSI,<sup>146</sup> the British effort against the Atlantic slave trade was based not on treaty law, but on unilateral action “building on the tradition of customary law.”<sup>147</sup> After a costly sixty year effort which consumed nearly two percent of British national income and roughly 5,000 British seamen,<sup>148</sup> by the second half of the century the British were successful in building the near universal international legal consensus banning the trade.<sup>149</sup> Again, customary international law arose as a result of the actions of one nation, the only nation that had the capability to undertake the state practice at the time.

### 3. Prohibition on Trafficking of Illegal Drugs.

The Law of the Sea Treaty instructs all states to cooperate in the suppression of the traffic in illegal drugs upon the high seas.<sup>150</sup> Enforcement of that duty, however, is not a matter of right under the treaty, but instead requires consent by the flag state to allow its ships to be interdicted.<sup>151</sup>

This area is governed by the statutory provisions of 46 U.S.C. § 1903,<sup>152</sup> and *United States v. Juda*.<sup>153</sup> The *Juda* case involved the

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engaging in the slave trade. International law no longer supports this proposition, but rather is in agreement with Justice Story’s opinion that the trade is universally prohibited and there is, indeed, a right of visit and search on the high seas. See *supra* notes 130-35 and accompanying text.

146. See Amity Shlaes, *Slavery’s Link to the War on Terror*, FIN. TIMES, Nov. 3, 2003, at 21.

147. *Id.*

148. *See id.*

149. *See id.*

150. “All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.” Law of the Sea Treaty, *supra* note 4, art. 108(1).

151. “Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the co-operation of other States to suppress such traffic.” *Id.* art. 108(2).

152. 46 U.S.C. § 1903(a) (2004). In pertinent part, the statute reads:

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

*Id.*

153. 797 F. Supp. 774 (N.D. Cal. 1992).

seizure of a “stateless”<sup>154</sup> vessel on the high seas for alleged trafficking in illegal drugs, in violation of § 1903. Although the court recognizes that, under U.S. domestic law, there is no breach of international law if there is “no state under whose flag the vessel sails,”<sup>155</sup> there is still required a Constitutionally based nexus between the stateless vessel and the U.S.<sup>156</sup> In this case, the required nexus was found in that five of the six persons arrested on the vessel were American citizens.<sup>157</sup> Because the illegal drugs found on board were discovered to be headed for Canada, and that there was no evidence that the drugs would, even ultimately, be destined for the U.S., that nexus alone was lacking.<sup>158</sup> The expression in *Juda* that a nexus must exist between the stateless vessel and the state asserting jurisdiction over it has become the accepted view in international law.<sup>159</sup>

Further state practice is evident in regional and bilateral treaties. In 1981, the U.S. and United Kingdom concluded an agreement which would permit the visit, search and seizure by U.S. authorities of British flagged vessels suspected of illicit traffic in narcotics.<sup>160</sup> The agreement did not require prior request by the U.S. nor approval by the U.K. before the interdiction could take place.<sup>161</sup>

In 1988, the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was concluded. It asserts that States party to the treaty may request permission from the flag state to board a vessel suspected of trafficking in illegal drugs.<sup>162</sup> This goes further than the Law of the Sea Treaty which only supports the right of flag states to request assistance in interdicting its own vessels.<sup>163</sup> A Council of Europe agreement followed the Vienna Convention in 1995, and permitted

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154. A stateless vessel is a ship without nationality. Statelessness of a vessel does not in and of itself entitle every state to assert jurisdiction over that vessel. The widely accepted view, however, is that such ships enjoy the protection of no state, so if interfered with on the high seas, no other state would be competent to complain of a violation. Another view is that there is a requirement of some nexus between the stateless vessel and the state asserting jurisdiction over it. See CHURCHILL & LOWE, *supra* note 64, at 214.

155. 797 F. Supp. at 778 (quoting *U.S. v. Rubies*, 612 F.2d 397, 403 (9th Cir. 1979)).

156. *See id.*

157. *See id.* at 779.

158. *See id.* That this nexus was lacking in this case does not mean that it is not a valid determination of a constitutionally required nexus.

159. See CHURCHILL & LOWE, *supra* note 64, at 214.

160. *See id.* at 219.

161. *See id.*

162. *See id.*

163. See Law of the Sea Treaty, *supra* note 4, art. 108.

prosecution for any drug offense by either the boarding state or the flag state, albeit after permission is given by the flag state.<sup>164</sup>

Tantamount to the agreement between the U.S. and U.K., the bilateral treaties between the U.S. and Trinidad and between Spain and Italy offer a more expansive right to seize vessels suspected of drug trafficking, and operate as authorization to seize the vessels of the other flag state.<sup>165</sup>

The foregoing have shown that under customary international law there exists a more extensive right of seizure on the high seas, and as a consequence, a more limited right of freedom of navigation than is expressed in the treaty law. When the Statement of Interdiction Principles of the PSI are said to be consistent with “national legal authorities, and with relevant international law and frameworks,”<sup>166</sup> it should be judges against customary international law.

#### IV. SEIZURE ON THE HIGH SEAS AS A RIGHT OF ANTICIPATORY SELF DEFENSE

The right of a coastal State to seize foreign vessels on the high seas may exist as a function of the inherent right of every State to self defense.<sup>167</sup> It has been argued in U.S. courts that the right to seize exists only as a right of belligerency.<sup>168</sup> This view, however, has little legitimacy given the realities and threats associated with modern international terror organizations and rogue states.<sup>169</sup> The preceding

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164. See CHURCHILL & LOWE, *supra* note 64, at 219.

165. See *id.* at 219-20.

166. See Proliferation Security Initiative, *supra* note 17.

167. See U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense.”).

168. See, e.g., *The Three Friends*, 166 U.S. 1, 63 (1897) (“[T]he recognition of belligerency involves the rights of blockade, visitation, search and seizure of contraband articles on the high seas and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.”).

169. See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA v (2002) (“The gravest danger our Nation faces lies at the crossroads of radicalism and technology.”), available at <http://www.whitehouse.gov/nsc/nss.pdf>; NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 1 (2003) (“Weapons of mass destruction . . . in the possession of hostile states and terrorists represent one of the greatest security challenges facing the United States.”), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>; *Non Proliferation of Weapons of Mass Destruction: A G8 Declaration* (2003) (“We recognize that the proliferation of weapons of mass destruction . . . and their means of delivery pose[] a growing danger to us all. Together with the spread of international terrorism, it is the pre-eminent threat to international security.”), available at <http://www.g8.fr/evian/english/navigation/>

sections have dealt with the limitations on the right of freedom of navigation on the high seas as a function of a coastal State's right of customs and revenue enforcement, and of the right to suppression of traffic in narcotic drugs. But it is a State's interest in its security that raises issues most closely associated with concepts of self defense and the use of force.<sup>170</sup>

#### A. *Self Defense Under the U.N. Charter*

The U.N. Charter contains the general prohibition in international law that all states shall refrain from the use force.<sup>171</sup> Article 2(4) does not, however, operate as an absolute bar to the use of force, but rather exists as the general prohibition, with the Charter itself providing explicit exceptions.<sup>172</sup> The right to self defense has a unique character, as it is the only exception for a State's individual or collective resort to force that exists continually.<sup>173</sup> The exception, outlined in Article 51,<sup>174</sup> contains two ambiguous phrases which, upon examination, will show that the right to self defense is more expansive under customary international law than as outlined in the U.N. Charter.

##### 1. Inherent Right

"Nothing in the present Charter shall impair the *inherent right* of individual or collective self-defense."<sup>175</sup> The phrase "inherent right" in the context of Article 51 is an express acknowledgement of a pre-existing right,<sup>176</sup> complete with conditions for the legitimate exercise thereof.<sup>177</sup> That a right of self defense existed prior to the U.N. Charter is

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2003\_g8\_summit/summit\_documents/non\_proliferation\_of\_weapons\_of\_mass\_destruction\_-\_a\_g8\_declaration.html.

170. See D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 70 (1958).

171. See U.N. CHARTER art. 2, para. 4 ("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 . . .").

172. See TIMOTHY L.H. MCCORMACK, SELF-DEFENSE IN INTERNATIONAL LAW 119 (1996).

173. See *id.* The author notes that the only other provision in the U.N. Charter which permits a State to resort to the unilateral use of force, Article 107, was an interim provision only in operation between the signing of the Charter and the establishment of the United Nations. See *id.* at 119 n. 27.

174. See U.N. CHARTER art. 51, *supra* note 166.

175. See U.N. CHARTER art. 51, *supra* note 166 (emphasis added).

176. See MCCORMACK, *supra* note 172, at 120.

177. See *id.*

“incontestable,”<sup>178</sup> and states retain those rights which customary international law afforded them prior to the Charter, except insofar as they have been specifically surrendered.<sup>179</sup> The International Court of Justice has interpreted the term “inherent right” as being of a “customary nature”<sup>180</sup> whose interpretation the Charter does not “regulate directly.”<sup>181</sup> It remains to be seen, however, what this definition of inherent right entails, as the ICJ’s interpretation indicates the right is “natural”<sup>182</sup> as well as “customary.”<sup>183</sup> Whatsoever the definition of “inherent right” to self defense might be, many writers agree that it is a right based in customary international law, existing independently of the Charter and not the subject of an express grant of authority.<sup>184</sup>

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178. BOWETT, *supra* note 170, at 184. *But see* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 274-75 (1963) (arguing that Article 51 of the U.N. Charter is not subject to the customary international law of self defense).

179. *See* BOWETT, *supra* note 170, at 185. In adhering to the U.N. Charter, states have specifically surrendered to the obligation in Article 2(4) to refrain from the threat or use of force against another state. However,

[a]ction undertaken for the purpose of, and limited to, the defence of a state’s political independence, territorial integrity, the lives and property of its nationals (and even to protect its economic independence) cannot by definition involve a threat or use of force ‘against the territorial integrity or political independence’ of any other state.

*Id.* at 185-86 (footnotes omitted). Furthermore, the exercise of the right of self defense is not inconsistent with the general purposes of the U.N. to maintain international peace and security. *See id.* at 186. Rather, the exercise of the right by a state in the interests of its own security does not contravene the general security. *See id.* As such, the obligation of Article 2(4) is not inconsistent with the right of self defense as it exists under international law. *See id.*

180. *Nicar. v. U.S.*, 1986 I.C.J. at 94.

181. *Id.*

182. *Id.* This Note does not address the right of self defense as a function of natural law, but mentions the ICJ opinion to reinforce the notion that “inherent right” means a right more expansive than as defined in the wording of the U.N. Charter. For an examination of the history of natural law as a basis for self defense, see BOWETT, *supra* note 169, at 4-8. Bowett argues that “[t]he attempts to define the right on this [natural law] basis have . . . been generally discredited.” *Id.* at 4. Bowett does, however, recognize that some aspects of the natural law of self defense still exist today, such as the limitation of the right of self defense to the protection of the property of a state, and the lives of its citizens. *See id.* at 4-5. Also, according to the early writers, fault on the part of the state against which the right of self defense was directed is an “essential condition of the lawful exercise of self-defense today.” *Id.* at 6. Furthermore, Bowett notes that there was general agreement among the early writers that the right of self defense was applicable “against an imminent or threatened injury, provided the danger was ‘immediate and imminent in point of time.’” *Id.* (footnote omitted). *See also* Sean D. Magenis, Note, *Natural Law as the Customary International Law of Self-Defense*, 20 B.U. INT’L L.J. 413, 433 (2002) (arguing that the customary international law standards regarding the use of force are in fact the standards articulated by natural law).

183. *Nicar. V. U.S.*, 1986 I.C.J. at 94.

184. *See* BOWETT, *supra* note 170, at 187. *See also* MCCORMACK, *supra* note 172, at 185 (arguing that Article 51 was intended to preserve customary international law regarding self defense); BROWNLIE, *supra* note 177, at 274 (conceding the point that the definition of the right of

## 2. Armed Attack

The U.N. Charter states that nothing shall impair the right of self defense “if an armed attack occurs against a Member of the United Nations.”<sup>185</sup> One interpretation of this provision is that the right of self defense is constrained and is available only to those states that have suffered an actual armed attack.<sup>186</sup> This view holds that the right of self defense may only be triggered in response to “aggression which is armed.”<sup>187</sup> Any action against a state, even if it is done in violation of international law, which is short of an armed attack will not vindicate the use of force in response.<sup>188</sup> Mere threats against a state, unaccompanied by action, are simply not enough.<sup>189</sup> Self defense under this reading of the Charter, then, can be defined as “counter-force”<sup>190</sup> coming as a “reaction to the use of force by the other party.”<sup>191</sup> It is argued that the only response a state may lawfully take if it feels threatened, in order to act within the Charter, is to repulse the attack once it materializes, or to await action by the Security Council.<sup>192</sup> Such a view has received strong support.<sup>193</sup> This Note argues, however, that such a restrictive reading of Article 51 ignores not only the threats to a State’s security in the modern world,<sup>194</sup> but also ignores the customary international law of self defense

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self defense in Article 51 may be “much closer to the customary law as it existed in 1945 than is commonly admitted”); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 165 (3d ed. 2001) (stating that the interpretation of “inherent right” as an expression of customary international law is the correct interpretation).

185. U.N. CHARTER art. 51

186. See BOWETT, *supra* note 170, at 187.

187. DINSTEIN, *supra* note 184, at 166.

188. See *id.* at 167.

189. See *id.*

190. *Id.* at 167.

191. *Id.*

192. See *id.*

193. See, e.g., BROWNLIE, *supra* note 178, at 275 (arguing that the ordinary meaning of the term “armed attack” precludes the use of force in anticipation of the attack); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 112 (2000) (stating that the majority of states reject the claim that there exists a right to use force before a states territory, or armed forces abroad, have been attacked).

194. See *supra* note 172 and accompanying text. See also BOWETT, *supra* note 170, at 191-92 (“No state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence.”); Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1634 (1984) (“States faced with a perceived danger of immediate attack, it is argued, cannot be expected to await the attack like sitting ducks.”); Michael J. Glennon, *Military Action Against Terrorists Under International Law: The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL’Y 539, 552 (2002) (“Waiting

that has been shown to be enshrined in a States inherent right to self defense.

### *B. Self Defense Under Customary International Law*

#### 1. Anticipatory Self Defense

As has been shown, the right of self defense under the U.N. Charter incorporates the customary international law of self defense,<sup>195</sup> which includes the right of a state to act against threatened attacks, not just those that have already taken place.<sup>196</sup> Although this interpretation of Article 51 may initially appear to be an ominous license for states to use preemptive force if merely threatened with attack, this view has never been completely discounted.<sup>197</sup> In fact, Judge Schwebel would leave the customary law right of self defense, including anticipatory self defense, intact under the Charter.<sup>198</sup>

It has been recognized that the exercise of the right of self defense in customary international law is not limited solely to cases of an armed attack,<sup>199</sup> but rather it may be “valid against imminent as well as actual attacks or dangers,”<sup>200</sup> and that there are certain situations in which the threat of an imminent attack is “so clear and the danger so great that defensive action is essential for self-preservation.”<sup>201</sup> The right of anticipatory self defense recognizes that an actual armed attack is not the

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for an aggressor to fire the first shot . . . is unrealistic for policy-makers entrusted with the solemn responsibility of safeguarding the well-being of their citizenry.”)

195. See *supra* Part IV.A.

196. See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 12 (2003).

197. See, e.g., MCCORMACK, *supra* note 172, at 139-44 (recounting the opinion of Judge Ago to the International Law Commission on State Responsibility which argued that it was not for the Commission to decide between a restrictive or broad interpretation of Article 51, despite having rejected the right of anticipatory self defense); *Nicar. v. U.S.*, 1986 I.C.J. at 347 (Schwebel, J., dissenting) (“The Court rightly observes that the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised in this case, and that the Court accordingly expresses no view on that issue.” Judge Schwebel continues, “I wish . . . to make clear that . . . I do not agree with a construction of the United Nations Charter which would read Article 51 as if it were worded: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs.’”). *Cf.* GRAY, *supra* note 193, at 112 (arguing that states rarely, if ever, base their justifications for the use of force on a right of anticipatory self defense).

198. See *Nicar. v. U.S.*, 1986 I.C.J. at 347-48.

199. See BOWETT, *supra* note 170, at 188.

200. *Id.* at 189.

201. Schachter, *supra* note 194, at 1634.

only form of aggression which a state may face to its security,<sup>202</sup> and the determination of what constitutes an imminent threat is a question of fact to be determined by the state invoking the right.<sup>203</sup> This does not mean, however, that the right of anticipatory self defense is unlimited. Rather, the right is limited by the preconditions for its exercise, as determined through customary international law, so as to avoid a broad authority for states to engage in preemptive use of force.<sup>204</sup>

The conditions for the valid exercise of anticipatory self defense were established by the *Caroline Case*,<sup>205</sup> where the issue was the legitimacy of the exercise of the right of self defense against an American ship, the *Caroline*, which was supplying rebels in British controlled Canada.<sup>206</sup> The issue arose after the British seized the *Caroline* while still in port in the U.S., set the ship afire, and sent it over Niagara Falls, killing two U.S. citizens.<sup>207</sup> In responding to the incident, Secretary of State Daniel Webster set forth the requirement for a valid exercise of anticipatory self defense, requiring that the British government show “a *necessity* for self-defense, *instant, overwhelming*, leaving *no choice of means*, and *no moment for deliberation*.”<sup>208</sup> This statement has long been viewed as the defining statement on the preconditions for the valid exercise of self defense in customary international law,<sup>209</sup> specifically, necessity and proportionality.<sup>210</sup> The *Caroline Case*, then, stands for the proposition that anticipatory self defense is valid under customary international law, provided the exercise of the right is necessary and proportionate to the threat posed.<sup>211</sup>

State practice with regard to the necessary and proportionate limitations on the right of anticipatory self defense verifies the customary international law as determined in the *Caroline Case*. International reaction to the use of force by Israel has strengthened the argument in favor of anticipatory self defense, and reaffirmed the limitations. In the first case, following the 1967 Six-Day War, a

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202. See BOWETT, *supra* note 170, at 192.

203. See *id.* at 193.

204. See Schachter, *supra* note 194, at 1634.

205. 29 B.F.S.P. 1137-38; 30 B.F.S.P. 195-96. The *Caroline Case* is the correspondence between the governments of the United Kingdom and the United States.

206. See *id.*

207. See *id.*

208. *Id.* (emphasis added).

209. See Greenwood, *supra* note 196, at 13; GRAY, *supra* note 193, at 105-6; DINSTEIN, *supra* note 187, at 219; Schachter, *supra* note 194, at 1635.

210. See GRAY, *supra* note 193, at 105.

211. See *id.* at 106.

resolution was defeated in the Security Council that would have condemned the resort to force by Israel as an act of aggression.<sup>212</sup> Instead, Israel's preemptive use of force was seen as the classic example of the application of anticipatory self defense,<sup>213</sup> and a recognition that in extreme circumstances, demonstrated by the threat posed to Israel, the necessity to act first in self defense may be fulfilled.<sup>214</sup>

In the second instance—Israel's bombing of the Iraqi nuclear reactor at Osiraq in 1981—the reaction of the international community was generally one of condemnation as a result, not of the invocation of the right of anticipatory self defense, but rather of Israel's failure to demonstrate an immediate threat—the “necessary” component of the *Caroline* test.<sup>215</sup> Regardless of whether or not Israel could have shown that the threat was necessary, the reaction by the international community tends to confirm the existence of the right to anticipatory self defense in those instances where an imminent threat can be proven to exist.<sup>216</sup> What constitutes an imminent threat, and what therefore will determine the question of necessity, is a purely factual issue determined by the particular case.<sup>217</sup>

Likewise, the issue of proportionality is also a factual issue.<sup>218</sup> Proportionality means that an act of self defense should not be punitive in nature,<sup>219</sup> but should instead involve the minimum level of force necessary to repel an attack,<sup>220</sup> or in the case of anticipatory self defense, to prevent the attack. Because proportionality is not a legal question,<sup>221</sup> it is difficult to develop standards by which a State's use of force in self defense can be judged to determine whether it is proportionate to the threat posed. Instead, it is easier to judge the use of force in question against previous actions that have been held to be proportionate. Although Israel's attack on the Iraqi nuclear reactor was viewed by the international community to be a violation of the necessity prong of the

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212. See 1967 U.N.Y.B. 190.

213. See Greenwood, *supra* note 196, at 14.

214. See *id.*

215. See *id.*

216. See Greenwood, *supra* note 196, at 14.

217. See GRAY, *supra* note 193, at 107.

218. See *id.*

219. See *id.* at 106.

220. See *id.*

221. See *id.*

*Caroline* test, it has been judged to be a proportionate response to the threat posed.<sup>222</sup>

The clearest example of a use of force in self defense that has been deemed not proportionate to the threat posed was established in *Nicaragua v. United States*.<sup>223</sup> Although the claim of self defense as pleaded by the U.S. was held invalid on other grounds,<sup>224</sup> the Court also held that the response of the U.S. violated the principle of proportionality. Referring to the mining of Nicaraguan ports and the attacking of its oil installations,<sup>225</sup> the Court held “[w]hatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.”<sup>226</sup>

The problem with relying on necessity and proportionality as defined by the *Caroline* and as verified by state action in the twentieth century is that neither takes into account the threats associated with the modern era.<sup>227</sup> The threat associated with WMD, and the dangers inherent in imposing upon a state the duty to wait for such a threat to materialize sufficiently to satisfy the factual determination of necessity, means that the threat should reasonably be considered imminent in spatial and temporal circumstances where no such threat would be considered imminent if only conventional weapons were involved.<sup>228</sup> Furthermore, the potential method of delivery of these weapons by terrorist organizations means that it is more difficult to pinpoint a moment in time when the threat of attack will materialize, unlike the relative level of predictability available when dealing with conventional armies and states.<sup>229</sup>

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222. McCormack’s conclusion that this exercise was a valid application of anticipatory self defense appears couched in terms of both necessity and proportionality:

Israel faced a nuclear threat which it had tried to remove by peaceful means for several years. It had no guarantee of its own security other than by taking its unilateral defensive action. It had a limited opportunity to remove that threat and chose to do so in a way that required a minimum amount of force with the least loss of human life.

MCCORMACK, *supra* note 172, at 302.

223. 1986 I.C.J. 14.

224. *See id.* at 118-20. The Court held that the actions of Nicaragua in supporting rebels in El Salvador, Honduras and Costa Rica constituted an armed attack by Nicaragua which would trigger the right of self defense in response. *Id.*

225. *See id.* at 122.

226. *Id.*

227. *See Greenwood, supra* note 196, at 16.

228. *See id.*

229. *See id.*

Finally, when dealing with the threat associated with the confluence of WMD and terrorist organizations, what constitutes a proportionate response may be difficult to define. The requirement of proportionality does not mean that a state exercising the right of self defense is restricted to the use of the same weapons, the same force level, or the same targets.<sup>230</sup> To truly act in anticipatory self defense against a global terror network, the requisite level of force needed to be effective may be greater than that involved in the *Caroline Case* or in *Nicaragua v. United States*. Fortunately, the resolution of this question is “dependent on the facts of the particular case.”<sup>231</sup>

## 2. Anticipatory Self Defense on the High Seas

It has been held that “[i]n certain circumstances the state cannot await the arrival of a danger to its security within its own territorial jurisdiction, but must take measures to prevent that danger from materializing”<sup>232</sup> beyond the limits of its territory. Indeed, this is the view of Chief Justice Marshall in *Church v. Hubbart*.<sup>233</sup> The principle of freedom of navigation on the high seas is subject to such a limitation because it is of no “greater sanctity”<sup>234</sup> than the principle of territorial integrity,<sup>235</sup> and when viewed in terms of self defense, it becomes clear that it is unreasonable for a state to sit idly by while a threat to its security forms on the high seas.<sup>236</sup> It is maintained that such a right exists as a matter of customary international law,<sup>237</sup> and it may be exercised in the form of a traditional use of force,<sup>238</sup> or for purposes of this Note, it may exist as a right of visit and search upon the high seas.<sup>239</sup>

It must be noted that the right of visit and search upon the high seas as a right of self defense does not only apply in time of war, but may, in exceptional circumstances be exercised by a state at peace.<sup>240</sup> The *Marianna Flora*<sup>241</sup> illustrates this point. The case involved the issue of the legality of the seizure of a Portuguese merchant vessel by a U.S.

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230. See GRAY, *supra* note 193, at 106.

231. *Id.* at 107.

232. BOWETT, *supra* note 170, at 66.

233. 6 U.S. at 234.

234. BOWETT, *supra* note 170, at 66.

235. *See id.*

236. *See id.* at 71.

237. *See id.* at 67.

238. *See id.* at 71.

239. *See id.*

240. *See id.* at 72.

241. 24 U.S. 1 (1826).

warship, after the U.S. ship mistook the Portuguese ship for a pirate.<sup>242</sup> In his opinion, Justice Story recognized the general principle of freedom of navigation on the high seas,<sup>243</sup> but held the seizure of the Portuguese merchant vessel to be justified “under the notion of just self-defence.”<sup>244</sup> Although the seizure took place during a time of peace and was the result of a misapprehension, the exercise of force in self defense by the U.S. warship was valid, as the circumstances were such as to give rise to a reasonable belief of danger to the state.<sup>245</sup>

The case of the *Virginus*<sup>246</sup> marks another example of the right to seize a foreign vessel on the high seas as a matter of self defense. The *Virginus* was an American vessel operated by Cuban insurgents engaged in a war with Spain, which was seized by a Spanish warship on the high seas off the coast of Cuba. At the time of seizure, the *Virginus* was carrying a large stockpile of weapons and a large contingent of insurgents, ostensibly headed to reinforce rebel forces in Cuba.<sup>247</sup> Following the summary execution of British and American nationals by Spanish authorities, Great Britain protested merely the lack of due process afforded its citizens, not the underlying seizure of the vessel on the high seas.<sup>248</sup> In fact, the seizure was recognized as a valid act of self defense,<sup>249</sup> the British government stating that “[m]uch may be excused in acts done under the expectation of instant damage in self-defence . . . .”<sup>250</sup> The British insisted, however, that the right was not unlimited, and that once the *Virginus* was seized “no pretence of imminent necessity of self-defence could be alleged.”<sup>251</sup>

Generally, the preconditions for the valid exercise of anticipatory self defense as established in the *Caroline Case*<sup>252</sup> provide the basis for the legitimate exercise of that right on the high seas.<sup>253</sup> When France asserted a right of visit and search on the high seas to curtail the shipment of weapons to Algeria during the period between 1956 and 1962, those states whose ships were subject to the practice staunchly

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242. *See id.* at 37.

243. *See id.* at 42 (“Upon the ocean . . . in time of peace, all possess an entire equality.”).

244. *Id.* at 39.

245. *See* BOWETT, *supra* note 170, at 72.

246. Moore, *Dig.*, Vol. II, p. 895.

247. *See* BOWETT, *supra* note 170, at 72; CHURCHILL & LOWE, *supra* note 64, at 216.

248. *See* BOWETT, *supra* note 170, at 72.

249. *See id.*

250. *Id.* at 73.

251. *Id.*

252. *See supra* note 211 and accompanying text.

253. *See* BROWNLIE, *supra* note 178, at 306.

opposed it as an invalid interference with freedom of navigation.<sup>254</sup> The French practice clearly suffered from a lack of proportionality to the threat posed, as nearly 5,000 foreign vessels were searched in one year alone.<sup>255</sup>

As a matter of self defense against threats to a state's security which have not yet materialized within its jurisdiction, the right to visit, search and seize foreign vessels exists as a narrow exception to the principle of freedom of navigation. In order for the exercise of the right to be legitimate, the state asserting it must comply with the test of the *Caroline*—the action must be necessary, and it must be proportionate to the threat posed.

## V. UNIVERSAL JURISDICTION

Some offenses are so heinous and so universally condemned that the prohibition of such actions has attained the status of *jus cogens*,<sup>256</sup> imposing on all nations a duty to act to suppress them. Such crimes have a universal jurisdiction, meaning that any state may apply its laws to punish those offenses, even though there may be no link of territory or nationality between the offense and the state acting to suppress it.<sup>257</sup>

The prohibitions on the crimes of slavery<sup>258</sup> and piracy<sup>259</sup> have attained *jus cogens* status, establishing a duty on all states to cooperate towards their suppression. The crime of slavery has not always been universally condemned,<sup>260</sup> but since universal jurisdiction over it was granted in the Law of the Sea Treaty and the High Seas Convention, the affirmative duty is no longer susceptible to derivation. Likewise, the past

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254. See CHURCHILL & LOWE, *supra* note 64, at 217.

255. See *id.* Churchill and Lowe also note the emergence during that period of new rules limiting the right to use force generally, especially Article 51 of the U.N. Charter, which, the authors claim, limits the right of self defense to cases of actual armed attack. See *id.* This narrow reading of the right of self defense under the Charter, however, does not comport with the customary international law right to anticipatory self defense. See *supra* Part IV.B.

256. *Jus cogens* is defined as “[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another.” BLACK’S LAW DICTIONARY 864 (7th ed. 1999)

257. See RESTATEMENT *supra* note 24, § 404.

258. See Law of the Sea Treaty, *supra* note 4, art. 99; High Seas Convention, *supra* note 7, art. 13.

259. See Law of the Sea Treaty, *supra* note 4, art. 100; High Seas Convention, *supra* note 7, art. 14.

260. See, e.g., *The Antelope*, 23 U.S. at 121-22 (holding that the usages of nations with regard to slavery indicate that it was not illegal).

cases supporting the legality of the slave trade<sup>261</sup> may not be invoked as indicating a right under customary international law to engage in it, or to refuse to suppress it.<sup>262</sup>

Unlike slavery, the universal condemnation of the crime of piracy has a longer jurisprudential history, and can trace its origins to the common interest of the European powers in protecting their maritime commerce routes.<sup>263</sup> The case of *United States v. Smith*<sup>264</sup> illustrates well how a prohibition of the crime of piracy achieved *jus cogens* status. In his opinion, Justice Story examines the crime of piracy by examining the works of jurists,<sup>265</sup> the “general usage and practice of nations,”<sup>266</sup> and judicial determinations upholding the law of nations with respect to the crime.<sup>267</sup> Story concludes that there is “scarcely a writer”<sup>268</sup> that does not consider the crime of piracy as well settled and clearly defined under international law.<sup>269</sup> Furthermore, the common law of nations recognizes piracy as an “offense against the universal law of society, a pirate being deemed an enemy of the human race.”<sup>270</sup>

Given this status of pirates and piracy in general, international law permits the seizure by any state of any ship on the high seas reasonably suspected of being a pirate, or of engaging in the crime of piracy.<sup>271</sup> Like any interference with the freedom of navigation on the high seas, this right is limited, and applies only to clearly marked warships in the service of the government of a State.<sup>272</sup>

If slavery and piracy are contrary to *jus cogens*, universally condemned and imposing an affirmative duty on all states to cooperate towards their suppression, and thereby permitting the right of a state to

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261. *See id.*

262. *See* BLACK’S LAW DICTIONARY, *supra* note 256. *See also* JANIS & NOYES, *supra* note 24, at 142 (*Jus cogens* norms trump both conventional and customary international law).

263. *See* CHURCHILL & LOWE, *supra* note 64, at 209.

264. 18 U.S. 153 (1820). The issue before the Court was whether Congress was “bound to define, in terms, the crime of piracy,” or could instead leave the crime to be “ascertained by judicial interpretation.” *Id.* at 158.

265. *See id.* at 160.

266. *Id.*

267. *See id.* at 161.

268. *Id.*

269. *See id.*

270. *Id.*; *see also* *United States v. Klintock*, 18 U.S. 144, 152 (1820) (“[Pirates] are proper objects of the penal law of all nations.”).

271. *See* Law of the Sea Treaty, *supra* note 4, art. 105; High Seas Convention, *supra* note 7, art. 19.

272. *See* Law of the Sea Treaty, *supra* note 4, art. 107; High Seas Convention, *supra* note 7, art. 21.

interfere with the freedom of navigation on the high seas by exercising a right of visit and search, then a comparison can be made to the condemnation of transfer of WMD.

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*<sup>273</sup> the ICJ was tasked by the U.N. General Assembly with determining whether or not use, or threat of use, of nuclear weapons was prohibited under international law.<sup>274</sup> The Court analyzed the question, *inter alia*, in light of Article 2(4) of the U.N. Charter,<sup>275</sup> under rules of customary international law<sup>276</sup> and under the principles of international humanitarian law.<sup>277</sup> Taken together, the Court was not able to reach a definitive conclusion of the issue, holding that there is no customary or treaty-based international law specifically authorizing the use or threat of nuclear weapons,<sup>278</sup> nor is there any “comprehensive and universal prohibition”<sup>279</sup> on the threat or use of nuclear weapons.<sup>280</sup>

The court did note, however, that if weapons of mass destruction are prohibited at all, that prohibition exists as a function of obligations undertaken pursuant to specific multilateral treaties.<sup>281</sup> Furthermore, the court admits that there exists an affirmative obligation for all states to cooperate to bring about a complete nuclear disarmament,<sup>282</sup> suggesting that the right of states to possess nuclear weapons, if one exists, is outweighed by the responsibility to curtail their proliferation.

The general condemnation of WMD can be evidenced by at least two multilateral treaties prohibiting both their use, and the transfer of the weapons between states. The Treaty on the Non-Proliferation of Nuclear Weapons<sup>283</sup> and the Bacteriological (Biological) and Toxin Weapons Convention<sup>284</sup> both evidence this strong desire of the parties to prohibit the use and acquisition of WMD.<sup>285</sup>

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273. 1996 I.C.J. 226 (July 8).

274. *See id.* at 228.

275. *See id.* at 244.

276. *See id.* at 253.

277. *See id.* at 262.

278. *See id.* at 266.

279. *Id.*

280. *See id.*

281. *See id.* at 248-52.

282. *See id.* at 267.

283. Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161.

284. Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

285. *See* Non-Proliferation Treaty, *supra* note 284, art. I; Biological Weapons Convention, *supra* note 285, art. I.

Like the crimes of piracy and slavery, the near universal condemnation of the transfer of WMD, as evidenced by specific multilateral treaties, could indicate that a new principle of *jus cogens* is being formulated, creating a universal jurisdiction over the act. As such, the exercise of a right of visit, search and seizure of foreign vessels on the high seas to suppress that trade may exist as yet another justification for the interference with the principle of freedom of navigation.

## VI. CONCLUSION

The Proliferation Security Initiative<sup>286</sup> represents a new global strategy designed to defeat an emerging global threat. The commitment of the participants in the PSI to take steps to impede the transfer of WMD, with particular regard given to the interdiction of such traffic on the high seas, marks a deviation from the principle of freedom of navigation enshrined in the Law of the Sea Treaty<sup>287</sup> and the High Seas Convention.<sup>288</sup> The right to interdict foreign vessels on the high seas exists, however, as a right of customary international law, which is incorporated into these treaties.<sup>289</sup> Whether this customary right exists as a function of revenue and customs enforcement, as a right of universal jurisdiction, or as a right of anticipatory self defense, the exercise of visit, search and seizure must comply with the conditions established by customary international law. In this sense, any interference with a foreign vessel's freedom of navigation must be necessary and proportionate to the threat posed.<sup>290</sup> When faced with the immense threat to a state's national security associated with international terrorist organizations in the possession of WMD, the boarding of a foreign merchant vessel to inspect, and potentially seize, its cargo appears to be a proportionate response. The Proliferation Security Initiative fully complies with these rules of customary international law.

*Ian Patrick Barry\**

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286. See *supra* note 15 and accompanying text.

287. See Law of the Sea Treaty, *supra* note 4, art. 92.

288. See High Seas Convention, *supra* note 7, art. 6.

289. See *supra* notes 62-63 and accompanying text.

290. See *supra* note 214 and accompanying text.

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