Indiana International & Comparative Law Review

Vol. 24 No. 3 2014

Indiana International & Comparative Law Review

Vol. 24 No. 3 2014

ROBERT H. MCKINNEY SCHOOL OF LAW

INDIANA UNIVERSITY
Indianapolis

Indiana University
Robert H. McKinney
School of Law
Lawrence W. Inlow Hall, 530 West New York Street, Indianapolis, IN 46202

Cite this Publication as IND. INT'L & COMP. L. REV.

The *Indiana International and Comparative Law Review* publishes professional and student scholarly articles in fields of international or comparative law. The *Review* welcomes submissions of scholarly legal articles on those topics.

The ideas, views, opinions, and conclusions expressed in articles appearing in this publication are those of the authors and not those of the *Review* or of Indiana University Robert H. McKinney School of Law.

Currently, the *Review* is published twice per year. The cost of a single issue is $9.00, and subscription rate is $18.00 per volume. The annual subscription rate for a foreign subscriber is $21.00.

Inquiries regarding submission of articles and comments or subscription may be directed to:

Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, IN 46202
(317) 274-1050
(317) 274-8825(fax)

COPYRIGHT AND FAIR USE

The *Review* is printed and distributed by Western Newspaper Publishing, Co., Inc., 537 E. Ohio St., Indianapolis, IN 46204-2173.

Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University Robert H. McKinney School of Law since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in public and private international law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a symposium issue devoted to a specific topic of international or comparative law published intermittently. Past symposium topics have included political and social aspects of Italian law, various aspects of Chinese law, and international terrorism in the twenty-first century.

_____
Name

_____
School/Firm/Business

_____
Address

_____
City, State, Zip Code

Subscriptions within the U.S. are $18.00 per year and outside the U.S. are $21.00 per year. I enclose $ _____ for _____ subscription(s) to the *Indiana International & Comparative Law Review*. Please make your check payable to the *Indiana International & Comparative Law Review*.

Mail to: Executive Production Editor
Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West Street
Indianapolis, IN 46202-3225

Please enter my subscription
to the
INDIANA LAW REVIEW

Name _____

Address _____

_____

_____

Enclosed is $_____ for _____ subscription(s)

Mail to: ATTN: Editorial Specialist
at
INDIANA LAW REVIEW
INDIANA UNIVERSITY ROBERT H. MCKINNEY
SCHOOL OF LAW
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is:
Domestic, $30; Foreign, $35; Student, $20
Single Issue, $10; Survey Issue $20
Symposium Issue, $15

In 2003, Indiana University Robert H. McKinney School of Law established a specialty law review focused specifically on health care law and policy:

INDIANA HEALTH LAW REVIEW

The scope of the INDIANA HEALTH LAW REVIEW includes bioethics, malpractice liability, managed care, anti-trust, health care organizations, medical-legal research, legal medicine, food and drug, and other current health-related topics.

Detach and mail this subscription form today to receive future issues

Subscription Price: $20.00

- Two (2) Issues
- Automatic Renewal
- Foreign Mailing Is Extra

Mail form to:
Indiana Health Law Review
Indiana University Robert H. McKinney School of Law
Attn: Executive Business Editor
Lawrence W. Inlow Hall, Room 136C
530 W. New York Street
Indianapolis, IN 46202-3225

Questions?
Email: ihlr@iupui.edu
Phone: (317) 278-9519
www.indylaw.indiana.edu/~ihlr

Mailing Address:
Name/Title _____
Company/School _____
Address _____
_____
City _____ State ___ ZIP _____
Email _____

Payment Method: ☐ Enclosed
(Make Check Payable to
INDIANA HEALTH LAW REVIEW)

☐ Bill Me Later

Indiana University Robert H. McKinney School of Law

2013-2014 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

MICHAEL A. MCROBBIE, *President of the University.* Ph.D., Australian National University.

CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis.* B.A., M.A., University of Minnesota; Ph.D., Ohio State University.

ANDREW R. KLEIN, *Dean and Paul E. Beam Professor of Law*. B.A., University of Wisconsin; J.D., Emory University School of Law.

ANTONY PAGE, *Vice Dean and Professor of Law.* B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

KAREN E. BRAVO, *Associate Dean for Graduate Studies and International Affairs, Professor of Law, John S. Grimes Fellow; Dean's Fellow.* B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

PATRICIA K. KINNEY, *Assistant Dean for Admissions*. B.S., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

JOHNNY D. PRYOR, *Assistant Dean for Student Affairs.* B.A., Wittenberg University; J.D., Indiana University Maurer School of Law.

JONNA KANE MACDOUGALL, *Assistant Dean for External Affairs and Alumni Relations.* B.A., M.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

CHASITY Q. THOMPSON, *Assistant Dean for Professional Development*. A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University Robert H. McKinney School of Law.

MARK V. WUNDER, *Assistant Dean for Development.* B.S., J.D., University of Iowa.

ELIZABETH ALLINGTON, *Director of Communications and Creative Services.* B.A., Indiana University; M.A., M. Phil., New York University.

TERESA (TERRI) J. CUELLAR, *Director of Technology Services*. B.S., St. Bonaventure University, New York.

VIRGINIA MARSCHAND, *Director of Administrative and Fiscal Affairs*. B.S., Indiana University—Kokomo; M.P.A., Indiana University Purdue University—Indianapolis; J.D., Indiana University Robert H. McKinney School of Law.

JOHN R. SCHAIBLEY, III, *Executive Director of the Center for Intellectual Property Law and Innovation and Adjunct Professor of Law.* B.A., Purdue University; J.D., Indiana University Maurer School of Law.

SONJA RICE, *Director of Special Projects.* B.A., Purdue University; J.D., Indiana University Robert H. McKinney School of Law.

LISA SCHRAGE, *Director of Development Services.* B.S., Marian University.

LAWANDA W. WARD, *Director of Pro Bono and Public Interest Programs.* B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University Robert H. McKinney School of Law.

ANTHONY MASSERIA, *Associate Director for Graduate Programs*. B.A., Hanover College; M.S. Ed., Indiana University.

SEAN SOUTHERN, *Associate Director, Office of Professional Development.* B.A., Ball State University; M.A., DePaul University; J.D., Loyola University Chicago School of Law.

CARLOTA TOLEDO, *Associate Director of Student Affairs*. A.B., University of Chicago; J.D., DePaul University College of Law.

SUSAN K. AGNEW, *Assistant Director of Student Affairs*. Clark College.

WILLIAM J. BAKER, *Assistant Director of Technology Services.* B.S., Purdue University.

SUSAN BUSHUE-RUSSELL, *Assistant Business Manager.* A.A.S., Lakeland College; B.S., Eastern Illinois University.

AMY ELSON, *Assistant Director, Hall Center for Law and Health.* B.A., M.A., Indiana University; J.D., Indiana University Maurer School of Law.

AMANDA GALLAGA, *Assistant Director of Recruitment.* B.A., Trinity University.

NOAH JOSEPH, *Assistant Director of Graduate Admissions*. B.A., Miami University; J.D., Indiana University Maurer School of Law.
LEANDRA ROSS, *Assistant Director of Financial Aid.* B.S., M.P.A., Indiana University.
EMILY TRINKLE, *Assistant Director of Advancement.* B.S., Indiana University.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law.* B.A., Kentucky Wesleyan College; J.D., Indiana University Robert H. McKinney School of Law.
JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.
CYNTHIA A. BAKER, *Clinical Professor of Law and Director, Program on Law and State Government.* B.A., J.D., Valparaiso University.
GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law.* B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.
SHAWN BOYNE, *Professor of Law, Co-Chair, Global Crisis Leadership Forum, Dean's Fellow; Grimes Fellow, DRIVE Fellow.* B.A., Cornell University; M.B.A., University of Minnesota; J.D., University of Southern California's Gould School of Law, M.A., Ph.D., University of Wisconsin; LL.M., Justus-Liebig-Universität.
ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.
JEFFREY O. COOPER, *Associate Professor of Law.* A.B., Harvard University; J.D., University of Pennsylvania Law School.
ERIC R. DANNENMAIER, *Professor of Law, Dean's Fellow; Director, Environmental, Energy and Natural Resources Law Program.* B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.
JAMES D. DIMITRI, *Clinical Professor of Law.* B.S., Indiana University; J.D., Valparaiso University School of Law.
JENNIFER A. DROBAC, *Professor of Law*. B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.
YVONNE M. DUTTON, *Associate Professor Law*. B.A., Columbia University; M.A., Ph.D., University of Colorado at Boulder; J.D., Columbia Law School.
GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Director, Program in International Human Rights Law; John S. Grimes Fellow.* B.A., North Carolina State University; J.D., Harvard Law School.
FRANK EMMERT, *John S. Grimes Professor of Law; Executive Director, Center for International and Comparative Law; Director, International and Comparative Law track, LL.M. Program.* Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.
NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law*. Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.
CARRIE HAGAN, *Clinical Associate Professor of Law.* B.A., University of Kansas; J.D., University of Cincinnati College of Law.
JOHN LAWRENCE HILL, *Professor of Law, Adjunct Professor of Philosophy, Grimes Fellow.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.
MAX HUFFMAN, *Associate Professor of Law and Dean's Fellow.* B.A., Cornell University; J.D., University of Cincinnati College of Law.
LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* B.A., Beloit College; J.D., M.B.A., University of Michigan; LL.M., New York University School of Law.
ROBERT A. KATZ, *Professor of Law*. A.B., Harvard College; J.D., University of Chicago Law School.
LINDA KELLY, *M. Dale Palmer Professor of Law.* B.A., J.D., University of Virginia.
NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus.* LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

GERARD N. MAGLIOCCA, *Samuel R. Rosen Professor of Law; Director, Intellectual Property Law track, LL.M. Program.*. B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Professor of Law.* B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law; Assistant Director of Legal Analysis, Research and Communication; Director, Master of Jurisprudence Program.* B.A., University of Evansville; J.D., Georgetown University Law Center.

EMILY MORRIS, *Associate Professor of Law and Dean's Fellow.* A.B., Harvard University; J.D., University of Michigan Law School.

NOVELLA NEDEFF, *Clinical Associate Professor of Law.* B.A., J.D., Indiana University.

JAMES P. NEHF, *Cleon H. Foust Fellow, John S. Grimes Fellow, and Professor of Law.* B.A., Knox College; J.D., University of North Carolina Law School.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health.* B.A., Brandeis University; J.D., M.D., Harvard University.

JOANNE ORR, *Clinical Professor of Law and Co-Director of Law School Clinical Programs.* B.S., Indiana State University; J.D., California Western School of Law.

MICHAEL J. PITTS, *Professor of Law and Dean's Fellow*. B.S.J., Northwestern University; J.D., Georgetown University Law Center.

FRAN QUIGLEY, *Clinical Professor of Law, Health and Human Rights Clinic; Director, International Human Rights track, LL.M. Program; Senior Advisor, Indiana University Center for Global Health.* B.A., Hanover College; M.A., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

GARY R. ROBERTS, *Dean Emeritus and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law.* B.A., University of Connecticut; LL.B., Harvard Law School.

JOAN M. RUHTENBERG, *Clinical Professor of Law and Director of Legal Analysis, Research and Communication.* B.A., Mississippi University for Women; J.D., Indiana University Robert H. McKinney School of Law.

MARGARET RYNZAR, *Associate Professor of Law and Dean's Fellow*. B.A., University of Chicago; M.A., Jagiellonian University; J.D., University of Notre Dame Law School.

JOEL M. SCHUMM, *Clinical Professor of Law and Director, Judicial Externship Program*. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University Robert H. McKinney School of Law.

LEA SHAVER, *Associate Professor of Law and Dean's Fellow*. B.A., M.A., University of Chicago; J.D., Yale Law School.

LAHNY R. SILVA, *Associate Professor of Law and Dean's Fellow.* B.A., M.A., Boston University; J.D., University of Connecticut School of Law; LL.M., University of Wisconsin Law School.

ROSS SILVERMAN, *Professor of Public Health and Law (Secondary Appointment).* B.A., Indiana University; J.D., Boston University School of Law; M.P.H., Boston University School of Public Health.

FRANK SULLIVAN, JR., *Professor of Practice*. A.B., Dartmouth College; J.D., Indiana University Maurer School of Law; LL.M., University of Virginia School of Law.

MARGARET C. TARKINGTON, *Associate Professor of Law and Dean's Fellow.* B.A., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University.

NICHOLAS TERRY, *Hall Render Professor of Law; Co-Director of the William S. and Christine S. Hall Center for Law and Health; Director, Health Law, Policy and Bioethics track, LL.M. Program*. B.A., Kingston University; LL.M., Corpus Christi College, University of Cambridge.

CARLTON MARK WATERHOUSE, *Professor of Law and Dean's Fellow.* B.S., Pennsylvania State University; J.D. with honors, Howard University School of Law; M.T.S., Emory University, Chandler School of Theology; Ph.D. with honors, Emory University.

FRANCES WATSON, *Clinical Professor of Law and Co-Director of Law School Clinical Programs.* B.S., Ball State University; J.D., Indiana University Robert H. McKinney School of Law.

JAMES PATRICK WHITE, *Professor of Law*. A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LLOYD T. WILSON, JR., *Professor of Law; Director, Joint Center for Asian Law Studies; Director, Chinese Law Summer Program; Director, American Law for Foreign Lawyers track, LL.M. Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University Maurer School of Law.

DANA R.H. WINTERS, *Associate Professor Law and Dean's Fellow*. B.A., Brown University; M.A., Ph.D., Harvard University; J.D., New York University School of Law.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law*. A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University Robert H. McKinney School of Law.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus.* B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

PAUL N. COX, *Centennial Professor of Law Emeritus.* B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law Emerita.* A.B., Mount Holyoke College; J.D., Indiana University Robert H. McKinney School of Law.

DAVID A. FUNK, *Professor of Law Emeritus.* A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus.* A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita.* B.S.J., Northwestern University; J.D., University of Colorado School of Law.

JEFFREY W. GROVE, *Professor of Law Emeritus*. A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy Emeritus.* A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus,* A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

WILLIAM ANDREW KERR, *Professor of Law Emeritus.* A.B., J.D., West Virginia University; B.D., Duke University; LL.M., Harvard Law School.

ELEANOR DEARMAN KINNEY, *Hall Render Professor of Law, Co-director of the William S. and Christine S. Hall Center for Law and Health Emerita.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

WILLIAM E. MARSH, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska.

SUSANAH M. MEAD, *Professor of Law Emerita.* B.A., Smith College; J.D., Indiana University Robert H. McKinney School of Law.

H. KATHLEEN PATCHEL, *Associate Professor Law Emerita*. A.B., Huntingdon College; J.D., University of North Carolina; LL.M., Yale Law School.

RONALD W. POLSTON, *Professor of Law Emeritus.* B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

KENNETH M. STROUD, *Professor of Law Emeritus.* A.B., J.D., Indiana University—Bloomington.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus*. B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus.* A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law Emeritus.* B.A., The Ohio State University; J.D., Capitol University Law School; LL.M., University of Texas School of Law.

MARY THERESE WOLF, *Clinical Professor of Law Emerita.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Ruth Lilly Law Library Faculty

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

SUSAN DAVID DEMAINE, *Research & Instruction Librarian*. B.A., Pennsylvania State University; M.S.L.S., J.D., University of Kentucky.

RICHARD HUMPHREY, *Reference Librarian.* A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Cataloging and Government Documents Librarian.* A.B., Taylor University; M.L.S., Indiana University.

BENJAMIN J. KEELE, *Research and Instruction Librarian.* B.A., University of Nebraska—Lincoln; J.D., Indiana University Maurer School of Law; M.L.S., Indiana University.

CATHERINE LEMMER, *Head of Information Services.* B.A., Lawrence University; J.D., University of Wisconsin; M.S., University of Illinois.

CHRIS E. LONG, *Cataloging Librarian.* B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

MIRIAM A. MURPHY, *Associate Director.* B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

IUPUI

ROBERT H. McKINNEY SCHOOL OF LAW

INDIANA UNIVERSITY
Indianapolis

Indiana International & Comparative Law Review, Volume XXIV 2013-2014

Indiana International & Comparative Law Review

Vol. 24 No. 3 2014

TABLE OF CONTENTS

ARTICLES

NOTES

LOOSENING LIPS TO AVOID SINKING SHIPS: DESIGNING A SHIP COMMUNICATIONS SYSTEM FOR THE BERING STRAIT REGION

Elizabeth Barrett Ristroph, Esq.*

ABSTRACT

This article compares systems that regulate ship traffic and communications and discusses the legal requirements for each one. It provides recommendations for a regulatory system for the Bering Strait and its surrounding waters—a remote and ecologically important region that is vulnerable to damage from increasing Arctic ship traffic. In cooperation with its Russian counterpart, the United States Coast Guard could work through the International Maritime Organization to establish a ship reporting system, a ship routing system, and/or vessel traffic services, as well as special areas that would be subject to additional regulatory measures. In designing a system, the Coast Guard should consider the Alaska Eskimo Whaling Commission reporting system already in place for oil and gas vessels in waters off the coast of Alaska.

CONTENTS

INTRODUCTION

The Bering Strait Region[1] is critically important for two reasons. First, as the only link between the Pacific Ocean and the Arctic Ocean, it is a major highway for arctic shipping.[2] Second, it supports some of the most unique wildlife in the world, which in turn has supported a subsistence culture for more than a thousand years.[3]

The number of commercial vessels traversing the Bering Strait Region and the Arctic Ocean has increased significantly in the past few years.[4] The upward trend will likely continue as melting ice makes the

---

* 1711 East West Road, Honolulu, Hawaii 96848. E. Barrett Ristroph serves as Arctic Program Representative for the Wilderness Society. She wrote this Article through the support of the World Wildlife Fund's (WWF) Bering Strait Shipping Project, which aims to protect the environment and subsistence activities in the Bering Strait Region, identify the best measures for ships passing through the region, and encourage the United States government to adopt these measures. Barrett would like to thank WWF U.S. Arctic Field Program Director Margaret Williams along with WWF staff members Verner Wilson and Elena Agarkova for their contributions to this article.

1. For purposes of this article, the "Bering Strait Region" refers to the marine area between North America and Asia from roughly 63o and 69o north latitude, consisting of the northern Bering Sea, the Bering Strait, and the southern Chukchi Sea. Andrew Hartsig et al., *Arctic Bottleneck: Protecting the Bering Strait Region from Increased Vessel Traffic,* 18 OCEAN & COASTAL L.J. 35, 37 (2012-13). The region extends from St. Lawrence Island and the northern Bering Sea north through the Bering Strait to the southern Chukchi Sea and Cape Lisburne. *Id.* The Bering Strait itself is approximately fifty-three miles and 180 feet deep. *See* Rebecca Woodgate et al., *Bering Strait: Pacific Gateway to the Arctic*, WASHINGTON.EDU, http://psc.apl.washington.edu/HLD/Bstrait/bstrait.html (last visited Nov. 2, 2013, *archived at* http://perma.cc/K9CE-RRV2).

2. ARCTIC COUNCIL, ARCTIC MARINE SHIPPING ASSESSMENT 2009 REPORT 18 (2009) [hereinafter AMSA REPORT].

3. *See id.* at 106 (discussing indigenous marine use); Port Access Route Study: In the Bering Strait, 75 Fed. Reg. 68568 (Nov. 8, 2010) (to be codified at 33 C.F.R. pt. 167) [hereinafter Bering Strait PARS]; CENTER FOR BIOLOGICAL DIVERSITY – EARTHJUSTICE – FRIENDS OF THE EARTH – OCEANA PACIFIC ENVIRONMENT – WORLD WILDLIFE FUND, COMMENT REGARDING PORT ACCESS ROUTE STUDY IN THE BERING STRAIT(75 FR 68568) 9-12 (2011), *archived at* http://perma.cc/D3MY-2W5R [hereinafter WWF PARS COMMENTS] (discussing the ecological importance of the Bering Strait); THOMAS L. LAUGHLIN ET AL., WORKSHOP REPORT: IUCN/NRDC/UAF WORKSHOP TO IDENTIFY SEVERAL VIABLE OPTIONS FOR THE PROTECTION OF ECOLOGICAL AND BIOLOGICALLY SIGNIFICANT AREAS (EBSAS) FROM THE POSSIBLE NEGATIVE EFFECTS OF SHIPPING AND OTHER MARITIME ACTIVITIES IN THE BERING STRAIT REGION, NOME, ALASKA, JUNE 26-28, 2012 9-10 (2012) [hereinafter NOME WORKSHOP REPORT] (describing ecological characteristics and subsistence use of the region).

4. ALASKA STATE LEGISLATURE, FINDINGS & RECOMMENDATIONS OF THE ALASKA NORTHERN WATERS TASK FORCE 14 (2012), *archived at* http://perma.cc/Q8C7-AC7V [hereinafter NWTF Report] (estimating 6000 vessels operating in or transiting through Arctic waters in 2006; estimating 7000 vessels in 2011); AMSA REPORT, *supra* note 2, at 4 (reporting 6000 vessels passing through Arctic waters during 2004); WWF, Arctic and Bering Strait Traffic Analysis (2011) (on file with author) (reporting 277 transits through the Bering Strait in 2009 and 513 in 2010); UNITED STATES COAST GUARD ARCTIC STRATEGY 5

Arctic more accessible.[5] Increased traffic brings more underwater ship noise[6] and a greater potential for pollution, oil spills,[7] and collisions between ships and marine mammals.[8] As of this writing, there is no system in place to minimize the risk of shipping accidents and the likelihood of damage to the region's wildlife and subsistence resources.

This Article analyzes the ship communications systems available under international and United States law for regulating Bering Strait traffic, including ship reporting systems, ship routing systems, vessel traffic services, and other communication systems. It considers the Alaska Eskimo Whaling Commission reporting system used to avoid conflict between oil and gas vessels and subsistence whaling, as well as systems operating in other parts of the world.

1. BACKGROUND

1.1. Wildlife and Subsistence in the Bering Strait Region

Positioned as the junction between the Pacific and the Arctic, the Bering Strait Region benefits from nutrient-rich waters that flow from the northern Bering Sea into the Chukchi Sea.[9] These waters support many birds, fish, and marine mammals, including a number of endangered species.[10] Approximately 10 million seabirds nest and forage in the Bering

---

(2013), *archived at* http://perma.cc/KSA3-QCDD [hereinafter USCG ARCTIC STRATEGY] (from 2008 to 2012, traffic through the Bering Strait increased by 118 percent).

5. AMSA REPORT, *supra* note 2, at 5 ("Offshore hydrocarbon developments may lead to increased marine traffic in the Bering Strait region"), 89, 136 (referring to melting ice); NWTF REPORT, *supra* note 4, at 2, 14 (noting diminishing ice and that many nations are actively building more ships designed to operate in Arctic waters); WWF PARS COMMENTS, *supra* note 3, at 13-15 (discussing current and proposed oil and gas and mining activities in the Arctic region and predicting increased vessel traffic in the region); *see* Hartsig et al., *supra* note 1, at 35 (discussing effect of climate change on Bering Strait region and Arctic).

6. *See, e.g.*, Marla M. Holt, Marine Mammal Ecology, Paper presented at the 17th Annual Endangered Species Act Seminar, Seattle, Wash. (Jan. 29, 2010) (discussing effects of exposure to underwater sound on marine mammals).

7. AMSA REPORT, *supra* note 2, at 106; *see also* MARINE MAMMAL COMMISSION, COMMENT REGARDING PORT ACCESS ROUTE STUDY IN THE BERING STRAIT (75 FR 68568) 2 (2011), *archived at* http://perma.cc/QTP8-HKPN [hereinafter MMC PARS COMMENTS] (discussing impacts of vessel traffic on whales and potential threats to marine mammals).

8. *See* AMSA REPORT, *supra* note 2, at 106 (ship strikes of whales and other marine mammals are of concern in areas where shipping routes coincide with seasonal migration and areas of aggregation); Hartsig, et al., *supra* note 1, at 14 (citing Randall Reeves et al., *Implications of Arctic Industrial Growth and Strategies to Mitigate Future Vessel and Fishing Gear Impacts on Bowhead Whales*, 36 MARINE POLICY 454, 458-459 (2012)).

9. *See* AUDUBON SOCIETY, COMMENT REGARDING PORT ACCESS ROUTE STUDY IN THE BERING STRAIT (75 FR 68568) 1 (Sept. 6, 2011) [hereinafter AUDUBON COMMENTS], *archived at* http://perma.cc/7VGM-KKCT [hereinafter AUDUBON COMMENTS]

10. *See* 50 C.F.R. § 17.11 (2011) (referring to species listed as threatened or endangered under the Endangered Species Act, including bowhead whales, polar bears, Steller sea lions,

Strait Region.[11] Hundreds of thousands of marine mammals of several species migrate through the strait in both spring and fall, including Pacific walrus; ringed, ribbon, spotted, and bearded seals; polar bears, and beluga, gray and bowhead whales.[12] Almost the entire Bering-Chukchi-Beaufort stock of bowhead whales—some 10,500 individuals—moves through the Bering Strait twice each year.[13] The bowhead whale[14] and other subsistence resources support indigenous coastal communities belonging to Iñupiaq, Central Yupik, and Siberian Yupik cultural groups in the Bering Strait Region and on the North Slope.[15] Residents of these communities have relied on the region's resources for over a thousand years.[16]

Subsistence resources provide more than just nutrition—they define and establish the sense of family and community.[17] Subsistence is closely linked with traditional values in Bering Strait native communities, including sharing, passing down knowledge regarding the resources, respect for elders, self-esteem for a successful harvest, and gratitude.[18] As stated in one study, "No other set of activities provides a similar moral foundation for continuity between generations."[19]

1.2. Navigational Infrastructure in the Bering Strait Region

Maritime infrastructure in the Bering Strait region is limited, with

---

and a number of bird species); MELANIE A. SMITH, PLACE-BASED SUMMARY OF THE ARCTIC MARINE SYNTHESIS 3 (2011) (referring to forty species of birds as well as several endangered or threatened seal and whale species in the Bering Strait region); NORTH PACIFIC FISHERY MANAGEMENT COUNCIL, FISHERY MANAGEMENT PLAN FOR FISH RESOURCES OF THE ARCTIC MANAGEMENT AREA 83-85 (2009) (showing essential habitat for Arctic cod, saffron cod, and snow crab).

11. AUDUBON COMMENTS, *supra* note 9, at 2.

12. AUDUBON COMMENTS, *supra* note 9, at 1.

13. Hartsig et al., *supra* note 1, at 41. While much of the fall and winter bowhead whale traffic occurs along the Russian side of the Bering Strait, the northward spring migration of the species takes place through U.S. Bering Strait waters, where vessel traffic levels are increasing. WWF PARS COMMENTS, *supra* note 3, at 17.

14. The bowhead whale is a species with significant subsistence importance. *See Overview of the Alaska Eskimo Whaling Commission*, ALASKA ESKIMO WHALING COMMISSION, http://www.bluediamondwebs.biz/Alaska-aewc-com/aboutus.asp (last visited Nov. 2, 2013, *archived at* http://perma.cc/989N-HKZN) (discussing the nutritional and cultural importance of the bowhead whale to Iñupiat and Yupik Eskimos).

15. AMSA REPORT, *supra* note 2, at 106.

16. AMSA REPORT, *supra* note 2, at 106.

17. DON CALLAWAY ET AL., IMPLICATIONS OF GLOBAL CHANGE IN ALASKA AND THE BERING SEA REGION, SUBSISTENCE FISHERIES 102 (Gunter Weller & Patricia A. Anderson eds., 1998), *archived at* http://perma.cc/RW8F-3WU5; *see also* Elizabeth B. Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 Ariz. J. Envtl. L. & POL'Y 47, 49-51 (2010) (describing the value of subsistence to North Slope communities).

18. CALLAWAY ET AL., *supra* note 17, at 97.

19. CALLAWAY ET AL., *supra* note 17, at 97.

only three major ports on the Alaskan side.[20] None of the Alaskan ports is a deep-water port capable of handling large vessels,[21] although the City of Nome has been considering the construction of a deep-water port.[22] "There are no formally established vessel routing measures in the Bering Strait region."[23] Although a standard Global Positioning System (GPS) fully covers the region, the high latitudes in the region may compromise its accuracy, and there is no differential GPS coverage.[24]

The U.S. Coast Guard maintains very high frequency (VHF) FM sites in the Bering Sea and high frequency (HF) radio guard for emergency calls, but HF coverage of the Arctic is poor.[25] There is local VHF coverage at certain villages within or near the region, including Nome, St. Lawrence Island, Kivalina, Wales, Kotzebue, Barrow, Point Lay, Point Hope, and Wainwright, and high frequency (HF) National Oceanic and Atmospheric Administration (NOAA) radios at Barrow and Kotzebue.[26] Outside of VHF and HF marine coverage, the U.S. Coast Guard relies on satellite

---

20. These include Nome, Kotzebue, and the DeLong Mountain Terminal. AMSA REPORT, *supra* note 2, at 108. Major Russian ports in the area are Provideniya, Anadyr, and Egvekinot. AMSA REPORT, *supra* note 2, at 108.

21. AMSA REPORT, *supra* note 2, at 175 (explaining that the closest U.S. deep-water port is Dutch Harbor/Unalaska in the southern Bering Sea, while on the Russian Federation side, the nearest deep-water port is Provideniya). Loading and unloading operations at Kotzebue and the DeLong Mountain Terminal are accomplished through lightering (transferring cargo from a larger, deep-draft vessel to smaller, shallower-draft vessels capable of entering shallow-draft ports). NORTHERN ECONOMICS, ALASKA REGIONAL PORTS: PLANNING FOR ALASKA'S REGIONAL PORTS AND HARBORS FINAL REPORT 35 (2011), *available at* www.dot.state.ak.us/stwddes/desports/assets/pdf/regionalports_finalreport0111.pdf.

22. CITY OF NOME, COMMENT REGARDING PORT ACCESS ROUTE STUDY IN THE BERING STRAIT (75 FR 68568) 2 (Feb. 23, 2011), *archived at* http://perma.cc/R6V4-E3XH ("the Port of Nome is currently reviewing design options, and seeking associated funding and support necessary to extend our facility to deeper water thereby providing the necessary Deepwater Port for the Northwest Arctic Region.")

23. AMSA REPORT, *supra* note 2, at 109.

24. AMSA REPORT, *supra* note 2, at 109; *NDGPS General Information*, UNITED STATES COAST GUARD, http://www.navcen.uscg.gov/?pageName=dgpsMain (last visited Feb. 15, 2014, *archived at* http://perma.cc/N2ND-5H52) (explaining that the positional error of a differential GPS position is 1 to 3 meters, greatly enhancing harbor entrance and approach navigation in comparison to standard GPS).

25. AMSA REPORT, *supra* note 2, at 109.

26. AMSA REPORT, *supra* note 2, at 164 (referring to VHF in Barrow, Nome, and Kotzebue). The Alaska Eskimo Whaling Commission Conflict Avoidance Agreement refers to VHF in each of the North Slope villages subject to the agreement, including Nuiqsut, Kaktovik, Barrow, Wainwright, Point Lay, and Point Hope. *See* 2012 OPEN WATER SEASON PROGRAMMATIC CONFLICT AVOIDANCE AGREEMENT §205 (Mar. 1, 2012) [hereinafter CAA]. In 2012, AEWC added additional communication centers on St. Lawrence Island, Kivalina, and Wales. E-mail from Earl Comstock, AEWC Counsel to author (Oct. 2, 2012) (on file with author).

communications.[27] Vessel tracking through a satellite-based system (Long Range Tracking and Identification) and a VHF system (Automatic Identification System) are available in the Bering Strait and surrounding region.[28]

There is no permanent U.S. Coast Guard presence in the Bering Sea region,[29] and the closest Coast Guard stations are hundreds of miles away in Unalaska/Dutch Harbor[30] and Kodiak.[31]

The Coast Guard has only two functioning icebreakers,[32] though sea ice is generally present along the Bering Strait for at least half of the year.[33] There are only three Coast Guard-maintained navigational aids at the Bering Strait along the north side of the Seward Peninsula into Kotzebue Sound,[34] and one aid to navigation tower near Point Hope[35] (roughly 200

27. AMSA REPORT, *supra* note 2, at 164.

28. Personal Communication with Ed Haney, Maritime Specialist, Marine Exchange of Alaska (Oct. 2, 2012).

29. *See, e.g.*, NUKA RESEARCH & PLANNING GROUP, LLC., OIL SPILL PREVENTION AND RESPONSE IN THE U.S. ARCTIC OCEAN: UNEXAMINED RISKS, UNACCEPTABLE CONSEQUENCES 23 (2010), *archived at* http://perma.cc/EU95-E8FM (noting that the closest Coast Guard air station to the Arctic is in Kodiak).

30. The Unalaska/Dutch Harbor station is a Marine Safety Detachment of the Anchorage Sector of the Coast Guard's Seventeenth District. Personal Communication with Marine Safety Detachment Supervisor Lt. James Fothergill (Nov. 8, 2012). It has a permanent presence in Unalaska and has jurisdiction over marine casualty investigations, pollution investigations, and domestic and foreign vessel inspections. *Id.*

31. *Units located in the 17th District*, UNITED STATES COAST GUARD, http://www.uscg.mil/d17/units.asp (last visited Feb. 15, 2014, *archived at* http://perma.cc/343K-QX7G).

32. Brian Moore, *Get Serious About the Arctic*, USNI NEWS (Aug. 5, 2012), http://news.usni.org/2012/08/05/get-serious-about-arctic, *archived at* http://perma.cc/MUY6-LSLA. The Coast Guard has two non-functioning icebreakers, including the Polar Sea, which is scheduled to be scrapped, and the Polar Star, which is undergoing renovations and should be ready by late 2013. *Id*.

33. AMSA REPORT, *supra* note 2, at 106 (explaining that sea ice typically develops along the coasts in October and November and retreats northward from May to July); *see also Current Bering Sea Ice Area*, THE UNIV. OF ILL. AT URBANA-CHAMPAIGN POLAR RESEARCH GROUP, DEP'T OF ATMOSPHERIC SCI., http://arctic.atmos.uiuc.edu/cryosphere/IMAGES/recent365.anom.region.2.html (last visited Feb. 15, 2014, *archived at* http://perma.cc/EG9E-E5UZ) (showing ice coverage of the Bering Sea in square kilometers); ALASKA CENTER FOR CLIMATE FOR ASSESSMENT & POLICY, SEA ICE, *archived at* http://perma.cc/8TJ7-XCR6 (explaining that sea ice is present along or close to the northern coast for eight to ten months of the year and affects much of the western coastline for at least several months of most years); *Community: Diomede*, STATE OF ALASKA, DEP'T OF COMMERCE, COMMUNITY, AND ECONOMIC DEVELOPMENT: COMMUNITY AND REGIONAL AFFAIRS, http://commerce.alaska.gov/cra/DCRAExternal/community/Details/9770db48-3493-41e4-b104-a4f5ea1a723a (last visited Feb. 15, 2014) (the Bering Strait is generally frozen between mid-December and mid-June).

34. AMSA REPORT, *supra* note 2, at 109.

miles north of the Bering Strait).

There is no spill response capability in the vicinity of the Bering Strait.[36] Since the Bering Strait is considered a remote area under Coast Guard rules, tank vessels may seek alternative compliance to meet the US requirements for oil spill response and financial responsibility.[37] Vessels may also simply use the Russian side of the international boundary. The Coast Guard has developed oil spill planning, firefighting, and salvage requirements for nontank vessels, but they are not yet in effect.[38]

The Coast Guard is aware of its limitations and making efforts to increase its Arctic presence. In 2010, the U.S. Coast Guard initiated an Alaska Deep Draft Arctic Ports Study for the Bering Strait with the objective of improving maritime traffic regulation and reducing marine casualties.[39] The study may recommend the establishment of a traffic separation scheme, the creation of a precautionary area or area to be avoided, the establishment of a Regulated Navigation Area, or other measures.[40] Recommendations from the study may lead to domestic rule-making or a proposal for an International Maritime Organization-established regulatory scheme.[41]

Plans for a new icebreaker are underway, though it may take $1 billion and a decade to build.[42] In the meantime, the Coast Guard has

---

35. Connie Braesch, *Day 10: Coast Guard Video of the Year*, COAST GUARD COMPASS (Dec. 30, 2010), http://coastguard.dodlive.mil/2010/12/day-10-coast-guard-video-of-the-year-2/, *archived at* http://perma.cc/92QJ-4UJ3. The Coast Guard installed this tower in 2010. *Id.*

36. ALASKA DEP'T OF ENVTL. CONSERVATION, DIV. OF SPILL PREVENTION AND RESPONSE, COMMENT REGARDING PORT ACCESS ROUTE STUDY IN THE BERING STRAIT (75 FR 68568) 6 (May 6, 2011), *archived at* http://perma.cc/WM26-TDGE.

37. *Id.* at 7; *see also FAQ*, ALASKA MARITIME PREVENTION & RESPONSE NETWORK, www.ak-mprn.org/faq.php, (last visited Feb. 15, 2014, *archived at* http://perma.cc/AF57-3X3S) (explaining that the U.S. Coast Guard adopted "The Western Alaska Alternative Planning Criteria" for Oil Tankers and vessels that carry oil as secondary cargo as an alternative option for meeting the Coast Guard's oil spill removal equipment capabilities outlined in the "Oil Pollution Prevention" regulations (33 C.F.R. 155 Subpart D)).

38. *See* Nontank Vessel Response Plans and Other Vessel Response Plan Requirements, 74 Fed. Reg. 44970 (proposed Aug. 31, 2009) (to be codified at 33 C.F.R. pt. 151, 155, and 160) (proposing rules for nontank response plans).

39. Bering Strait PARS, *supra* note 3. At the same time, the Alaska Department of Transportation and Public Facilities (DOT&PF) and the Army Corps of Engineers have been co-sponsoring an Alaska Deep Draft Arctic Ports Study to evaluate potential deep-water port locations. ALASKA DEP'T OF TRANSP. & PUB. FACILITIES/STATEWIDE DESIGN & ENG'G SERV., ARCTIC PORT STUDY (2013), *archived at* http://perma.cc/7MG2-X7UL.

40. *See* Bering Strait PARS, *supra* note 3. The study was supposed to be completed in late 2012. Bering Strait PARS, *supra* note 3. As of this writing it is not available.

41. *See* Bering Strait PARS, *supra* note 3.

42. Editorial, *Scrapping the Polar Sea Stopped While Lawmakers Search for Budgetary Icebreaker*, SEATTLE TIMES, June 21, 2012, *archived at* http://perma.cc/LC6W-XB3G ("Local officials with Vigor Industrial in Seattle, which has worked on both the Polar Star and Polar Sea, put the cost of a new icebreaker at $800 million to $1 billion; the work takes a

launched an effort known as Arctic Shield to increase its presence in the Arctic.[43] In the summer of 2012, the Coast Guard stationed two cutters, two smaller ships, and two helicopters in Barrow, Alaska.[44] Corpsmen engaged in community outreach and practiced deploying oil skimmers in Arctic waters.[45]

2. LEGAL FRAMEWORK

Since a significant portion of the Bering Strait Region is beyond the United States' twelve-mile territorial sea,[46] federal law alone will not sufficiently protect the region. This Article discusses a range of national, bilateral, and multilateral sources of law that can be applied to the region, including both enforceable "hard" and voluntary "soft" law. While hard law can provide more protection than soft law, it may be difficult to enforce in the remote Bering Strait Region.

Voluntary guidelines or agreements, while unenforceable, may be implemented more quickly with less political capital.[47] As in the case of hard law, compliance is more likely if ships know they are being monitored.[48]

---

decade."). In 2012, Congress appropriated funds to initiate survey and design activities for a new polar icebreaker An Act to authorize appropriations for the Coast Guard for fiscal years 2013 through 2014, and for other purposes. Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, 126 Stat. 1560 (2012).

43. *See* UNITED STATES COAST GUARD, ARCTIC SHIELD 2012, http://www.uscg.mil/d17/docs/Arctic%20Trifold%20-%20120614-2.pdf, *archived at* http://perma.cc/6K38-CE3F.

44. Hannah Heimbuch, *Coast Guard Leaves Arctic for Winter Season*, THE ARCTIC SOUNDER, Nov. 9, 2012, http://www.thearcticsounder.com/article/1245coast_guard_leaves_arctic_for_winter_season, *archived at* http://perma.cc/ZS8M-29F7.

45. *Id.*

46. *Bering Strait*, WORLDATLAS, http://www.worldatlas.com/aatlas/infopage/bering.htm (last visited Mar. 15, 2014, *archived at* http://perma.cc/V9CH-EUSY).

47. *See* NIHAN ÜNLÜ, PARTICULARLY SENSITIVE SEA AREAS: PAST PRESENT AND FUTURE 8 (2007), *archived at* http://perma.cc/KV24-4Y6J (suggesting that voluntary guidelines may lead to more positive and significant results than a treaty which is ratified or applied by only a few States); NOME WORKSHOP REPORT, *supra* note 3, at 17 (voluntary guidelines may be developed more quickly than binding agreements and lend themselves to bilateral agreements).

48. At an August 2012 Bering Strait Region workshop, Coast Guard retiree Ed Page suggested that that the vast majority of vessels comply with voluntary speed restrictions when others vessels are able to monitor their speeds using automated tracking technology. Amelia Cooper, *Organizations Prepare for Increased Arctic Shipping* 1, NOME NUGGET, July 5, 2012, http://www.nomenugget.net/archives/2012/070512nn.pdf, *archived at* http://perma.cc/LYM4-4D88. In contrast, NOAA biologist Brad Hanson, speaking at the same workshop, said that voluntary measures do not work well, and that better compliance is achieved when someone is watching it all times. *Id*. at 6. Another example of voluntary compliance is the International Maritime Organization [IMO]-established Area to Be Avoided near the Olympic Coast National Marine Sanctuary in Washington State. A

2.1. Intergovernmental and International Bodies and Legal Regimes

2.1.1. International Maritime Organization

The International Maritime Organization (IMO) is responsible for the safety and security of shipping and the prevention of ship pollution.[49] It was chartered as the Intergovernmental Maritime Consultative Organization (IMCO) in 1959, when its organic treaty went into effect.[50] IMCO was the first global international organization with competency over marine affairs and marine environmental protection. It became a specialized agency within the United Nations system in 1982 and changed its name to IMO.[51] IMO facilitates most international maritime conventions and establishes international rules and standards governing vessel traffic.[52]

IMO developed two sets of voluntary guidelines that are particularly significant for Arctic shipping—the 2002 Guidelines for Ships Operating in Arctic Ice-Covered Waters[53] and the 2009 Guidelines for Ships Operating in Polar Waters.[54] The 2002 Guidelines address navigation safety and pollution prevention for Arctic waters beyond the existing requirements in international conventions.[55] They introduce a system of Polar Classes to differentiate ships' capacities to navigate and operate in Arctic waters,

---

National Oceanic and Atmospheric Administration report noted that most vessels avoided the area, even though it was established through a voluntary guideline. *See* GEORGE GALASSO, OLYMPIC COAST NATIONAL MARINE SANCTUARY AREA TO BE AVOIDED (ATBA) EDUCATION AND MONITORING PROGRAM 1-4 (2000), *archived at* http://perma.cc/9ZKL-VS8L. *See also* Christopher P. Knight, *NORDREG Now Mandatory Within the Northwest Passage*, ASSOCIATION OF CORPORATE COUNSEL (Nov. 5, 2010), http://www.lexology.com/library/detail.aspx?g=e10bded7-7e16-40f2-96f8-c65c2df4f756, *archived at* http://perma.cc/W96N-63U5 (prior to Canada's creation of mandatory reporting zones in 2010, virtually all vessels operating in these areas complied with a voluntary reporting scheme, since it allowed access to services such as ice information, routing, icebreaker assistance, and search and rescue response).

49. *Introduction to IMO*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/About/Pages/Default.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/ENQ2-X224).

50. Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48.

51. *Introduction to IMO*, *supra* note 49.

52. AMSA REPORT, *supra* note 2, at 50.

53. OYSTEIN JENSEN, FRIDTJOF NANSENS INSTITUTT, THE IMO GUIDELINES FOR SHIPS OPERATING IN ARCTIC ICE-COVERED WATERS (2002) [hereinafter 2002 GUIDELINES].

54. International Maritime Organization [IMO], *Guidelines for Ships Operating in Polar Waters*, IMO ASSEMBLY RES. A.1024 (26) (Dec. 2, 2009) [hereinafter 2009 Guidelines]. The Preamble to the Polar Shipping Guidelines does not specifically revoke the 2002 Guidelines, so the 2002 Guidelines should still apply to the extent they are not inconsistent with the 2009 Guidelines.

55. *Ships Operating in Polar Regions*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/ourwork/safety/safetytopics/pages/polarshippingsafety.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/N9UB-27LG).

where Polar Class 1 vessels are capable of operating year-round in all Arctic ice-covered waters.[56]

The 2009 Guidelines are similar in form and content to the 2002 Guidelines, but expand coverage to Antarctic waters.[57] There are few provisions on communication, but the Guidelines do suggest that all ships be provided with Automatic Identification Systems (AIS).[58] Also, the Guidelines suggest that all ships be capable of receiving ice and weather information charts and displaying ice imagery.[59]

IMO is now developing a mandatory[60] Polar Code that was in draft form at the time this Article was published.[61] The Polar Code is intended to "cover the full range of design, construction, equipment, operational, training, search and rescue and environmental protection matters relevant to ships operating in the inhospitable waters surrounding the two poles."[62] The form and content will likely be similar to the 2009 Guidelines,[63] and will probably not change the jurisdiction of coastal states or cover ships' routing.[64]

2.1.2. Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)[65] serves as a framework for international agreements and regulations concerning vessels.[66] Although UNCLOS was never ratified by

---

56. 2002 GUIDELINES, *supra* note 53, at P-2.7, G-3.18.

57. 2009 Guidelines, *supra* note 54, at G-3.2, (defining polar waters to include both Arctic and Antarctic waters).

58. 2009 Guidelines, *supra* note 54, at 12.7; 2002 GUIDELINES, *supra* note 53, at 12.7.

59. 2009 Guidelines, *supra* note 54, at 12.11.1-12.11.2; 2002 GUIDELINES, *supra* note 53, at 12.12.1-12.12.2.

60. The IMO working group developing the Polar Code agreed that it should be made mandatory under SOLAS and/or MARPOL. *See Meeting Summary: Sub-Committee on Ship Design and Equipment (DE), 53rd session: 22-26 Feb. 2010*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/MediaCentre/MeetingSummaries/DE/Pages/DE-53rd-Session.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/9WF3-RPPT).

61. Cooper, *supra* note 48, at 6; NWTF REPORT, *supra* note 4, at 14.

62. *Meeting Summary: Sub-Committee on Ship Design and Equipment (DE)*, *supra* note 60.

63. PowerPoint Presentation, Ove Tautra, Norwegian Maritime Directorate The Polar Code Negotiations—Power and Compromises (stating that the current draft of the Polar Code has the same chapters as the Guidelines, although in another order, and some chapters may be omitted; chapter content is based on the Guidelines).

64. *Id*.

65. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]. UNCLOS came into force in 1994. *Id*.

66. *See* Craig H. Allen, *Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention*, 10 SAN DIEGO INT'L L.J. 265, 274 n.36 (2009) (collecting sources suggesting that UNCLOS was designed to be applied in conjunction with other international agreements and customary international law).

the United States, much of it may be viewed as international customary law.[67]

UNCLOS divides responsibility for navigation safety, environmental protection, and other matters between coastal states (those bordering the waters where a vessel passes), the port state (the vessel's destination), and the vessel's flag state (the state with which the vessel is registered).[68] The flag state has primary responsibility for controlling the vessel's navigation,[69] while the coastal state must provide notice of any known navigational dangers within its twelve-mile territorial sea.[70] All states have some responsibility for controlling pollution and protecting the environment.[71]

A coastal state can exercise full sovereignty over ships in its internal waters and set conditions for entry into its ports.[72] A coastal state may

---

67. *See* United States v. Kun Yun Jho, 465 F. Supp. 2d 618, 632 (E.D. Tex. 2006) ("The United Nations Convention on the Law of the Sea (UNCLOS) is a codification of customary international law negotiated under the auspices of a United Nations conference.") *rev'd on other grounds*, 534 F.3d 398 (5th Cir. 2008); United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998) (citing UNCLOS); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (except for its Part XI, the LOS Convention is already part of customary international law and in that way creates rights and obligations for the United States); United States Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983), *archived at* http://perma.cc/X8AK-88YU (recognizing that the UNCLOS navigation and overflight provisions confirm existing maritime law and fairly balance the interest of all states).

67. The Coast Guard identifies UNCLOS as "'among the most important treaties for [the] protection of the marine environment.'" Benedict S. Gullo, *The Illegal Discharge of Oil on the High Seas: The U.S. Coast Guard's Ongoing Battle against Vessel Polluters and a New Approach toward Establishing Environmental Compliance*, 209 MIL. L. REV. 122, 141 (Fall, 2011) (alteration added) (citing COAST GUARD MARITIME LAW ENFORCEMENT MANUAL, COMDTINST M16247, ¶9.B.1 (2010)).

68. UNCLOS, *supra* note 65, art. 92. Under article 92, a ship generally must sail under the flag of one state only (the ship's flag state). UNCLOS, *supra* note 65, art. 92. There must exist a genuine link between the flag state and the ship, as the ship will have the nationality of that state. *See* UNCLOS, *supra* note 65, art. 91.

69. UNCLOS, *supra* note 65, at art. 94(3)(c) (requiring the flag state to ensure safety at sea by measures that include "the maintenance of communications and the prevention of collisions").

70. UNCLOS, *supra* note 65, art. 24(2).

71. UNCLOS, *supra* note 65, art. 194(1) (requiring states to take "individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source" with regard to vessels and other marine installations and devices). Section 5 of UNCLOS, International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment (articles 207—212) generally assign pollution control responsibilities to all states, with some responsibilities and rights specific to coastal states. UNCLOS, *supra* note 65, art 207-212. Article 192 imposes on all states an obligation to preserve and protect the environment. UNCLOS, *supra* note 65, art. 192.

72. UNCLOS, *supra* note 65, art. 2 (describing sovereignty of coastal state), art. 8

prescribe unilateral standards regarding navigation, pollution control and other matters for its territorial sea, although these standards generally cannot apply to "the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."[73] Nor can standards impede the right of innocent passage.[74]

UNCLOS article 22 allows a coastal state to establish sea lanes and traffic separation schemes in its territorial sea and require ships to follow these lanes or schemes, so long as the coastal state takes into account (a) any relevant IMO[75] recommendations; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic.[76]

Coastal state control is more limited beyond the territorial sea[77] and in "international straits." Although UNCLOS did not define "international strait," the term was discussed extensively in the Corfu Channel case decided by the International Court of Justice in 1949.[78] The court indicated that international straits are distinguished by geographical and functional criteria, with "the decisive criterion" being the strait's "geographical situation as connecting two parts of the high seas and the fact of its being

---

(defining internal waters and explaining that the right of innocent passage exists only in internal waters that previously had not been considered as such). Article 25(2) recognizes the coastal state's right to prescribe conditions for entry into its internal waters and ports and to take necessary steps to prevent a breach of those conditions by foreign vessels. UNCLOS, *supra* note 65, art. 25(2); *see also* UNCLOS, *supra* note 65, arts. 38 and 211(3) (referring to the conditions of entry of a port state); 33 U.S.C. §1228 (1990) (providing authority for the Secretary to prescribe conditions for entry to ports in the United States); 33 U.S.C. §1223(d) (1990) (generally exempting foreign vessels in innocent or transit passage from the Ports and Waterways Act except where authorized by a treaty or where the vessel is destined for or departing from a port or place subject to the jurisdiction of the United States); 33 C.F.R. §§160.103(c), 164.02 (providing exemptions for certain foreign vessels in innocent or transit passage).

73. UNCLOS, *supra* note 65, art. 21(2).

74. *See* UNCLOS, *supra* note 65, art. 17 (ships of all states enjoy the right of innocent passage through the territorial sea).

75. The Convention does not directly refer to IMO, although its references to "competent international organizations" have been interpreted to refer to IMO in the context of environmental protection, equipment and design standards, and vessel traffic. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 513 cmts. j & d (1987) (noting that the "competent international organization" is "principally the IMO"); *see also* George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention IV: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee*, 36 CAL. W. INT'L L.J. 133, 167 (2005).

76. UNCLOS, *supra* note 65, art. 22.

77. *See* UNCLOS, *supra* note 65, art. 211(4). For example, a coastal state may unilaterally adopt pollution control laws that govern foreign vessels within the coastal state's territorial sea, as long as the laws do not impair the right of innocent passage. A coastal state may also adopt laws within its 200-mile exclusive economic zone (EEZ) under article 211(5), but these laws must be consistent with generally accepted international rules. UNCLOS, *supra* note 65, art. 211(5).

78. *See* The Corfu Channel Case, Judgment, 1949 I.C.J. 4 (Apr. 9).

used for international navigation."[79] Given that the Bering Strait is the only place connecting the Arctic and Pacific Oceans, it is used by most international vessels crossing the Arctic, and it is not within the internal waters of any one country, it is likely to be an international strait.[80]

Vessels in international straits have a right of "transit passage," which is the exercise of "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait."[81] In general, the laws and regulations that a coastal state may adopt with respect to transit passage through an international strait are more limited than those relating to innocent passage.[82] UNCLOS allows coastal states regulating transit passage to adopt laws relating to safety of navigation, vessel traffic, pollution control, fishing, and customs, fiscal, immigration, and sanitary issues,[83] but these laws and regulations may "not discriminate in form or in fact among foreign ships" and cannot "have the practical effect of denying, hampering or impairing the right of transit passage."[84]

Since coastal states along an international strait cannot impede, impair, hinder, deny, or suspend the right of transit passage,[85] they are limited in their abilities to enforce their regulations against vessels in transit. But under article 233 they can "take appropriate enforcement measures"[86] in the event transiting vessels violate the regulations in a manner "causing or threatening major damage to the marine environment of

---

79. *See id.*, 28 (Merits).

80. *See* UNCLOS, *supra* note 65, Part III, arts. 34-45 (discussing transit passage). It is generally acknowledged that the Bering Strait meets the UNCLOS definition of an international strait. *See, e.g.*, AMSA REPORT, *supra* note 2, at 106 ("The Bering Strait is a narrow international strait . . .") (alteration added); Jon M. Van Dyke, *Transit Passage Through International Straits*, *in* THE FUTURE OF OCEAN REGIME-BUILDING: ESSAYS IN TRIBUTE TO DOUGLAS M. JOHNSTON 178 (Aldo E. Chircop, Ted McDorman, Susan Rolston eds., 2009) (referring to the Bering Strait as one of several "key" international straits).

81. UNCLOS, *supra* note 65, art. 38(2). Transit passage is similar to innocent passage, but is "free from many of the restrictions implied in innocent passage." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 513 cmt. j (1987). For example, a coastal state may temporarily suspend innocent passage through the territorial sea, but it may not suspend transit passage through an international strait. *Id.* Similarly, submarines must surface in innocent passage, but may remain submerged in transit passage. *Id.*

82. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 513 cmt. j (1987).

83. UNCLOS, *supra* note 65, art. 42(1).

84. UNCLOS, *supra* note 65, art. 42(2).

85. Van Dyke, *supra* note 80, at 184 (citing UNCLOS articles 38(1), 42(2) and 44).

86. The Malacca Straits States (Indonesia, Malaysia, and Singapore) have interpreted Article 233 to allow them to take appropriate enforcement measures against ships passing through the Straits that fail to meet the 3.5 meter under-keel clearance requirement which they have established. Van Dyke, *supra* note 80, at 184; *see also* ANA G. LÓPEZ MARTÍN, INTERNATIONAL STRAITS: CONCEPT, CLASSIFICATION AND RULES OF PASSAGE 173 (2010) (suggesting that it would be reasonable for a coastal state to impose an execution measure that impedes, hinders, or hampers the right of transit passage but prevents greater damage to the coastal state).

the straits."[87]

A coastal state can "designate sea lanes and prescribe traffic separation schemes . . . where necessary to promote the safe passage of ships,"[88] but this cannot be done unilaterally. The state must develop a regulatory proposal for IMO approval in cooperation with other states bordering the strait.[89]

Article 234 allows for greater coastal state control over ice covered areas. Coastal states can unilaterally adopt

> regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.[90]

It is not clear how much ice covering is required to give effect to this article. While much of the Bering Strait Region is covered by ice half of the year,[91] this may be reduced with climate change. It is also not clear from the text if the coastal state's ability to regulate ice covered areas under article 234 trumps the limitations imposed by articles regulating international

---

87. Van Dyke, *supra* note 80, at 184. Article 220 of UNCLOS allows a coastal State to investigate and detain foreign ships suspected of violating pollution laws in the coastal State's territorial sea or exclusive economic zone, but it is not clear what enforcement measures a coastal State could take against foreign vessels in an international strait.

88. UNCLOS, *supra* note 65, art. 41(1).

89. UNCLOS, *supra* note 65, art. 41(4-5).

90. UNCLOS, *supra* note 65, art. 234.

91. AMSA REPORT, *supra* note 2, at 106 (explaining that sea ice typically develops along the coasts in October and November and retreats northward from May to July); *see also The Cyrosphere Today*, THE UNIV. OF ILL. AT URBANA-CHAMPAIGN POLAR RESEARCH GROUP, DEP'T OF ATMOSPHERIC SCI., http://arctic.atmos.uiuc.edu/cryosphere/ (last visited Feb. 15, 2014, *archived at* http://perma.cc/JFE6-X8J5) (showing ice coverage of the Bering Sea in square kilometers); *Sea Ice*, ALASKA CENTER FOR CLIMATE ASSESSMENT & POLICY, https://web.archive.org/web/20120913071336/http://ine.uaf.edu/accap/sea_ice.html (last visited Feb. 15, 2014, *archived at* http://perma.cc/5TCH-LRRZ) (explaining that sea ice is present along or close to the northern coast for eight to ten months of the year and affects much of the western coastline for at least several months of most years); *Community: Diomede, General Overview, Geography and Climate*, STATE OF ALASKA, DEPARTMENT OF COMMERCE, http://commerce.alaska.gov/cra/DCRAExternal/community/Details/9770db48-3493-41e4-b104-a4f5ea1a723a (last visited Feb. 15, 2014, *archived at* http://perma.cc/Y9L9-LW6M) (the Bering Strait is generally frozen between mid-December and mid-June).

straits.

Article 211 offers another route to greater coastal state control in the context of pollution prevention, where justified by an area's oceanographical and ecological conditions, as well as the particular character of its traffic.[92] A coastal state can, after consulting with other states concerned, submit a request to IMO for permission to adopt laws on pollution prevention or navigational practices.[93] The proposal cannot include "design, construction, manning or equipment standards other than generally accepted international rules and standards."[94]

Article 211 is the only article in UNCLOS that refers to routing systems. It allows States, acting through IMO, to designate routing systems "designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States."[95]

2.1.3. Convention for the Safety of Life at Sea

The Convention for the Safety of Life at Sea (SOLAS)[96] is more directly relevant to the ship communications systems discussed in this Article than UNCLOS. SOLAS, and its associated codes, set international safety standards for the construction, machinery, equipment, and operation of merchant ships.[97] Flag states are responsible for ensuring compliance of

92. UNCLOS, *supra* note 65, art. 211(6)(a).

93. UNCLOS, *supra* note 65, art. 211(6)(a). The state must also submit scientific and technical evidence in support of the request. *Id.* If IMO finds that the request is justified, the coastal state may put the proposal into effect, provided 15 months have passed since the submission of the request. UNCLOS, *supra* note 65, art. 211(6)(a).

94. UNCLOS, *supra* note 65, art. 211(6)(c).

95. UNCLOS, *supra* note 65, art. 211(1). The International Convention for the Safety of Life at Sea, discussed *infra*, provides far more detail on routing measures than UNCLOS.

96. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1226 U.N.T.S. 213 [hereinafter SOLAS], (as amended). SOLAS has been ratified by all Arctic countries. *See Status of Multilateral Conventions and Instruments in Respect of which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions*, IMO (Sept. 30, 2013), http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf, *archived at* http://perma.cc/ZP7U-B96X [hereinafter Convention Status]. The amended version of Chapter V of SOLAS, which concerns navigation, came into force in 2002. *See Vessel Traffic Services*, IMO, http://www.imo.org/OurWork/Safety/Navigation/Pages/VesselTrafficServices.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/4X3G-PZNZ).

97. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, IMO, http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx, *archived at* http://perma.cc/4UG3-WHXT. SOLAS also includes standards for passenger ships, although there are not yet any international construction requirements for cruise ships in polar operations. AMSA REPORT, *supra* note 2, at 55. Cruise ships may operate in the Arctic at certain times of the year and in

their ships with SOLAS.[98]

IMO regulations under SOLAS allow IMO to adopt ship routing systems that direct vessel traffic in certain areas,[99] as well as ship reporting systems that facilitate communication between vessels and shore-based facilities.[100] These can be established to improve the safety of life at sea, the safety and efficiency of navigation, or the protection of the marine environment.[101] SOLAS regulations also provide for shore-based vessel traffic systems,[102] which can range from a simple information exchange with ships to comprehensive management of vessel traffic in a particular area.[103] SOLAS regulations require most large ships engaged in international voyages to be equipped with Automatic Identification Systems and Long-Range Identification and Tracking Systems that automatically transmit information about the ship to other ships and coastal authorities.[104] Like UNCLOS, SOLAS imposes a duty on states to provide navigational warnings.[105]

SOLAS also provides for an "ice patrol" of the North Atlantic near the Grand Banks of Newfoundland, where icebergs are common.[106] The patrol has been in place since the aftermath of the Titanic sinking.[107] It is led by the United States, and each SOLAS party interested in the services helps pay for the cost of the patrol.[108] The Ice Patrol and the Canadian Ice Service issue one daily iceberg analysis to vessels[109] during the period of

---

areas of open water. AMSA REPORT, *supra* note 2, at 55

98. SOLAS, *supra* note 96.

99. SOLAS, *supra* note 96, Reg. V/10.1.

100. SOLAS, *supra* note 96, Reg. V/11.1.

101. IMO, *Guidance Note on the Preparation of Proposals on Ships' Routeing Systems and Ship Reporting Systems for Submission to the Sub-Committee on Safety of Navigation* §1.2, IMO Doc. MSC/Cir. 1060 (Jan. 6, 2003) [hereinafter SOLAS Guidelines].

102. SOLAS, *supra* note 96, Reg. V/12.

103. *See Vessel Traffic Services*, *supra* note 96.

104. SOLAS, *supra* note 96, Regs. V/19.2.1, V/19.2.4.

105. SOLAS, *supra* note 96, Reg. V/4 ("Each Contracting Government shall take all steps necessary to ensure that, when intelligence of any dangers is received from whatever reliable source, it shall be promptly brought to the knowledge of those concerned and communicated to other interested Governments."); *see also* SOLAS, *supra* note 96, Reg. V/5 (encouraging governments to provide meteorological services and warnings on waves, ice, wind, and other data and transmit weather observations to vessels free of charge).

106. *See* SOLAS, *supra* note 96, Reg. V/6; SOLAS, *supra* note 96, appendix to chapter V, §1.2.

107. *About International Ice Patrol*, U.S. COAST GUARD, http://www.navcen.uscg.gov/?pageName=IIPHome (last visited Feb. 15, 2015, *archived at* http://perma.cc/66E3-TZ8P).

108. *See* SOLAS, *supra* note 96, Reg. V/6.4-6.5; SOLAS, *supra* note 96, appendix to chapter V, §2. Contributions are based on the average annual gross tonnage of each states' ships passing through the iceberg region during the previous three ice seasons. SOLAS, *supra* note 96, appendix to chapter V, §2.

109. *About International Ice Patrol, supra* note 107.

patrol, which lasts from February 15 to July 1 each year.[110] According to the Ice Patrol, no vessel that has heeded the Ice Patrol's published iceberg limit has collided with an iceberg.[111]

2.1.4. Convention for the International Regulations for Preventing Collisions at Sea

The Convention for the International Regulations for Preventing Collisions at Sea (COLREGs) aims to avoid collisions and ensure navigational safety.[112] The term "collision" is not defined and could be interpreted to apply to vessel-whale collisions, although the convention only refers to collisions between two vessels.[113]

COLREGs rule 5 requires that every vessel maintain a proper lookout by sight, hearing, and other means at all times, so as to make a full appraisal of the situation and of the risk of collision.[114] If interpreted to apply to vessel-whale collisions, this provision could be used to justify requirements for marine-mammal observers on vessels.

Rule 6 requires every vessel to proceed at a safe speed at all times.[115] Factors in determining a safe speed include consideration of traffic and environmental conditions, such as ice and the presence of fishing vessels.[116]

Rule 10 requires vessels to follow IMO-adopted traffic separation schemes.[117] Fishing vessels "shall not impede the passage of any vessel following a traffic lane," but are not banned from fishing.[118] This could be interpreted to apply to subsistence fishing and whaling.

2.1.5. Convention for the Prevention of Pollution from Ships

The International Convention for the Prevention of Pollution from Ships (MARPOL)[119] allows Special Areas of the ocean to be designated for

110. *See* SOLAS, *supra* note 96, Reg. V/6.2.

111. *About International Ice Patrol*, *supra* note 107.

112. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 U.N.T.S. 16 [hereinafter COLREGs]. COLREGs has been ratified by all Arctic countries. *See* Convention Status, *supra* note 96. COLREGs is implemented through federal law. *See* 33 U.S.C. § 1602 (2002), (International Regulations).

113. COLREGs, *supra* note 112.

114. COLREGs, *supra* note 112, rule 5.

115. COLREGs, *supra* note 112, rule 6.

116. COLREGs, *supra* note 112, rule 6.

117. COLREGs, *supra* note 112, rule 10.

118. COLREGs, *supra* note 112, rule 10(i); *see also* COLREGs, *supra* note 112, rule 9(c) ("A vessel engaged in fishing shall not impede the passage of any other vessel navigating within a narrow channel or fairway.") Similarly, small vessels (less than 20 meters in length) must not impede the safe passage of a power-driven vessel following a traffic lane. COLREGs, *supra* note 112, rule 10(j).

119. Protocol of 1978 Relating to the International Convention for the Prevention of

protection from oil pollution,[120] noxious liquid substances in bulk,[121] sewage,[122] and garbage.[123]

2.1.6. Convention on Standards of Training, Certification and Watchkeeping for Seafarers

The 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW),[124] and the Seafarers' Training, Certification and Watchkeeping Code originally adopted in 1995,[125] contain international standards for mariner license qualifications, training, and deck and engineering watchstanding.[126] To obtain a certain level of certification,[127] a mariner must have knowledge of navigation and maneuvering in ice-covered waters[128] and in traffic separation schemes.[129] While in the ports of a party to the convention, ship officers (including those from states that are non-parties) are subject to verification that all mariners on board have the proper training certificates under the

---

Pollution from Ships, 1973, Feb. 17, 1978, 1340 U.N.T.S. 62 [hereinafter MARPOL]. MARPOL has been ratified by all Arctic countries. Convention Status, *supra* note 96, at 108-12.

120. MARPOL, *supra* note 119, at Annex I; IMO, *Guidelines for the Designation of Special Areas Under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, IMO Assemb. Res. A. 927(22) § 2.1 (Nov. 29, 2001) [hereinafter MARPOL Guidelines]; *see also Special Areas Under MARPOL*, IMO, www.imo.org/OurWork/Environment/PollutionPrevention/SpecialAreasUnderMARPOL/Pages/Default.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/5GMY-SEXW) (noting the existence of a Baltic Sea special area under Annex IV).

121. MARPOL, *supra* note 119, at Annex II; MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.1.

122. MARPOL, *supra* note 119, at Annex IV; MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.1.

123. MARPOL, *supra* note 119, at Annex V; MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.1.

124. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1978, 1361 U.N.T.S. 190, *archived at* http://perma.cc/F5SU-JS4L (as amended) [hereinafter STCW Convention]. The STCW Convention has been ratified by all Arctic countries. Convention Status, *supra* note 96.

125. *See* Seafarers' Training, Certification and Watchkeeping Code, Adopted as Resolution 2 by the 1995 Conference of Parties to the STCW Convention, July 7, 1995, 1969 U.N.T.S. 41, 67, *archived at* http://perma.cc/P3UN-VDRG [hereinafter STCW Code]. Federal regulations implementing the STCW Convention and Code are codified at 46 C.F.R. §§15.1101-.1111 (1997).

126. STCW Convention *supra* note 124. The STCW Convention does not apply to fishing vessels or "wooden ships of primitive build." *See* STCW Convention, *supra* note 124, art. III.

127. *See* STCW Convention, *supra* note 124, at appendix to Reg. II/2 (pertaining to certification of masters and chief mates of ships of 200 gross register tons or more).

128. *See* STCW Convention, *supra* note 124, at appendix to Reg. II/2, 2(a)(iii), 7(n).

129. *See* STCW Convention, *supra* note 124, at appendix to Reg. II/2, 2(a)(v), 7(o).

convention.[130]

2.1.7. International Convention on Maritime Search and Rescue

The 1979 International Convention on Maritime Search and Rescue (SAR Convention) provides for the establishment of ship reporting systems for search and rescue purposes and encourages the use of existing systems as well as voluntary reporting for these purposes.[131] IMO has established thirteen major search and rescue areas around the world.[132]

2.1.8. Arctic Council

The Arctic Council, established through the Ottawa Declaration of 1996, is an intergovernmental forum composed of Canada, Denmark (for Greenland), Finland, Iceland, Norway, Russia, Sweden, and the United States.[133] In addition to these Member States, indigenous peoples' organizations such as the Inuit Circumpolar Council serve as Permanent Participants.[134] The Arctic Council has issued numerous non-binding guidelines and reports such as the Arctic Environmental Protection Strategy,[135] the Arctic Climate Impact Assessment,[136] the Arctic Marine Shipping Assessment,[137] and the Arctic Council Offshore Oil and Gas Guidelines.[138]

Through the 2008 Ilulissat Declaration,[139] five of the eight Arctic

---

130. STCW Convention, *supra* note 124, art. X(1).

131. International Convention on Maritime Search and Rescue art. 6, Apr. 27, 1979, 1405 U.N.T.S. 119 [hereinafter SAR Agreement].

132. *See International Convention on Maritime Search and Rescue (SAR)*, IMO, http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx (last visited Dec. 7, 2013, *archived at* http://perma.cc/7TQA-KWZN).

133. *See* GOVERNMENTS OF THE ARTIC COUNTRIES, DECLARATION ON THE ESTABLISHMENT OF THE ARCTIC COUNCIL (Sept. 19, 1996), *archived at* http://perma.cc/3W97-3YJU.

134. *Id.*

135. Arctic Environmental Protection Strategy, June 14, 1991, 30 I.L.M. 1624, *archived at* http://perma.cc/J7UE-K68E.

136. *Arctic Climate Impact Assessment*, ARCTIC MONITORING AND ASSESSMENT PROGRAMME (2004), http://amap.no/acia/ (last visited Feb. 15, 2014, *archived at* http://perma.cc/6DBC-WX8Q).

137. AMSA REPORT, *supra* note 2.

138. ARCTIC COUNCIL, PROTECTION OF THE ARCTIC MARINE ENVIRONMENT WORKING GROUP, ARCTIC OFFSHORE OIL AND GAS GUIDELINES (Apr. 29, 2009), *archived at* http://perma.cc/KW2G-PR4M.

139. THE ILULISSAT DECLARATION, ARCTIC OCEAN CONFERENCE (May 28, 2008), *archived at* http://perma.cc/9FHS-JC7G. Canada, Denmark, Norway, Russia, and the United States met in Ilulissat, Greenland for the conference. *Id.* Representatives from the three other Arctic states (Iceland, Finland, and Sweden) were apparently not invited to participate. *See id.*

states (those with coastline on the Arctic Ocean) declared that the "law of the sea"[140] is an "extensive international legal framework," and that they "therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean."[141] That said, the coastal states expressed a willingness to cooperate in the areas of environmental protection, navigational safety, and scientific research, and to form bilateral and multilateral arrangements between relevant states.[142]

The following year, the Arctic Council published the 2009 Arctic Marine Shipping Assessment (AMSA),[143] providing recommendations concerning safety, marine infrastructure, and environmental and subsistence protection.[144] AMSA encourages states to work with IMO to harmonize and update standards for vessels operating in the Arctic.[145] In particular, AMSA calls for engagement with Arctic communities and environmental protection, including the designation of environmentally sensitive areas.[146]

In 2011, the Arctic Council issued its first legally binding instrument, the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic.[147] The Agreement recognizes the increase in Arctic maritime traffic and activity.[148] It requires parties to consider using ship reporting systems in promoting mutual search and rescue cooperation and exchange of experience.[149]

In 2013, the Arctic Council issued the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic,[150] requiring each party to "maintain a national system for responding promptly and effectively to oil pollution incidents."[151]

2.2. Bilateral Treaties Relevant to the Bering Strait Region

The United States and Russia have several agreements that apply to the Bering Strait Region, including the 1972 Agreement on Cooperation in

---

140. This language implies a reference to UNCLOS, although the Ilulissat Declaration did not directly refer to this convention.

141. THE ILULISSAT DECLARATION, *supra* note 139.

142. THE ILULISSAT DECLARATION, *supra* note 139.

143. AMSA REPORT, *supra* note 2.

144. AMSA REPORT, *supra* note 2, at 6-7.

145. AMSA REPORT, *supra* note 2, at 6.

146. AMSA REPORT, *supra* note 2, at 6-7.

147. Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic, May 12, 2011, *archived at* http://perma.cc/JS68-YXX7.

148. *Id.* at preamble.

149. *Id.* art. 9(3).

150. Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, May 15, 2013, *archived at* http://perma.cc/F7GD-7ZVR.

151. *Id.* art. 4.

the Field of Environmental Protection,[152] a 1972 Agreement on Cooperation in Combating Pollution in the Bering and Chukchi Seas,[153] and a 1995 memorandum of understanding on areas such as search and rescue and maritime law enforcement.[154]

Russia also has its own laws applicable to the Russian side of the Bering Strait Region, including national safety and environmental standards specific to navigation in Russian Arctic waters.[155] Russia employs a ship inspection system for passage through the Northern Sea Route, which extends through the Bering Strait.[156]

The United States will need to continue cooperating with Russia if it plans to submit a regulatory proposal for the Bering Strait Region to IMO.[157] It could also develop a bilateral agreement just between the two countries (without IMO's involvement), although this would not bind vessels from other countries.

---

152. Agreement on Cooperation in Environmental Protection, U.S.-U.S.S.R, May 23, 1972, T.I.A.S. No. 7345.

153. Agreement Between the Government of the United States and the Government of the Union of Soviet Socialist Republics Concerning Cooperation in Combating Pollution in the Bering and Chukchi Seas in Emergency Situations, May 11,1989, T.I.A.S. No. 11446 (this Agreement adopted the Joint Contingency Plan against Pollution in the Bering and Chukchi Seas).

154. Admiral Robert E. Kramek & Commander W. Russell Webster, *Steaming with the Russians*, U.S. NAVAL INSTITUTE PROCEEDINGS MAGAZINE, Dec. 1997, *archived at* http://perma.cc/Y9YL-K692.

155. AMSA REPORT, *supra* note 2, at 67; *see also Amendments to Laws Regulating Merchant Shipping on the Northern Sea Route,* PRESIDENT OF RUSSIA (July 30, 2012, 3:10 PM), http://eng.kremlin.ru/acts/4232, *archived at* http://perma.cc/9A6F-GT8V; *Northern Sea Route Law Passed by the Federation Council*, ARCTIC INFO (July 19, 2012), http://www.arctic-info.com/News/Page/northern-sea-route-law-passed-by-the-federation-council, *archived at* http://perma.cc/UBF3-88RZ. This law provides for modern infrastructure to ensure safe navigation of vessels along the Northern Sea Route, including navigational support and ice-breaking. *Id.* The law established a federal agency that reviews applications for the right to sail in the waters and issues sailing permits. *Id.* Permits will require proof of insurance or ability to pay for pollution damage. *Id.*

156. AMSA REPORT, *supra* note 2, at 67.

157. *See* Tim Bradner, *Arctic Drill Rules Advance; Shell Spill Dome OK'd*, ALASKA JOURNAL OF COMMERCE (Aug. 15, 2013), http://www.alaskajournal.com/Alaska-Journal-of-Commerce/August-Issue-3-2013/Arctic-drill-rules-advance-Shell-spill-dome-OKd/, *archived at* http://perma.cc/4E5Y-CP7W (U.S. Coast Guard Rear Admiral Thomas Ostebo suggested that Russia has a lot of influence over a vessel traffic system because the bulk of the Arctic traffic is over Russia's Northern Sea Route, across the Arctic from Europe to Asia, and through the Bering Strait).

2.3. United States Law

2.3.1. Ports and Waterways Safety Act

The 1972 Ports and Waterways Safety Act and its amendments (collectively, PWSA) aim to ensure safe navigation as well as environmental protection.[158] PWSA applies to the navigable waters of the United States (out to twelve nautical miles)[159] and, in some cases, to the "marine environment," which includes the 200 nautical mile Exclusive Economic Zone of the United States.[160]

The U.S. Coast Guard is the main agency responsible for PWSA and other maritime laws in the United States and has the authority to implement vessel reporting, routing, and management measures in both internal and offshore waters.[161] The Coast Guard can construct, operate, maintain, improve, or expand vessel traffic services in any port or place within the United States' territorial sea,[162] or in any area covered by an international agreement.[163]

2.3.2. Navigation Safety Regulations

The Coast Guard promulgated the navigation safety regulations (NSRs) in 1977 for almost all navigable US waters.[164] These regulations require most large vessels to carry designated charts and nautical publications and be equipped with radar and an automated trafficking

158. *See* Ports and Waterways Safety Act, Pub. L. No. 92-340, 86 Stat. 424 (1972) (codified as amended at 33 U.S.C. §§1221-1236 (2006)) [hereinafter PWSA].

159. 33 U.S.C. § 1222(5) (2006).

160. PWSA broadly defines "marine environment" to include the navigable waters of the United States and the land and resources within and under those waters, including the seabed and subsoil of the Outer Continental Shelf, fishery resources, "and the recreational, economic, and scenic values of such waters and resources." 33 U.S.C. § 1222(1) (2006).

161. *See, e.g.*, 33 U.S.C. §1230(c) (2006) (authorizing Coast Guard to implement vessel traffic services); 33 U.S.C. §1230(d), (2006) (authorizing Coast Guard to implement ship reporting systems); 33 C.F.R. §160.201 (2013) (requiring ships to report advance notice of arrival); *id.* § 165 (2013) (regulated navigation areas); *id.* § 167 (2013) (offshore traffic separation schemes); *id.* § 169 (2013) (ship reporting systems).

162. Port and Tanker Safety Act (PTSA), Pub. L. No. 95-474, §4(a), 92 Stat. 1471, (1978), *reprinted in* 1978 U.S.C.C.A.N. 3270; Oil Pollution Act of 1990 (OPA 1990), Pub. L. No. 101-380, tit. IV, §4107(a), 104 Stat. 484, 514 (codified as amended at 33 U.S.C. §1223(a)(1)).

163. *See* 33 U.S.C. § 1230 (1998) (authorizing negotiations to establish vessel traffic systems and listing the existing ship reporting systems); National Vessel Traffic Services Regulations (VTS Final Rules), 59 Fed. Reg. 36316-36317 (July 15, 1994) (reorganizing regulations and making participation in VTSs mandatory), codified at 33 C.F.R. pts. 26, 160, 162, 164, and 165.

164. 33 C.F.R. § 164 (2013); *see also* U.S. Coast Guard, Final Rules, Navigation Safety Regulations, 42 Fed. Reg. 5956 (Jan. 31, 1977).

system.[165] They include criteria for determining safe speed[166] and other safety standards.

2.3.3. 2010 U.S. Coast Guard Authorization Act

Section 307 of the 2010 U.S. Coast Guard Authorization Act aims to implement the Arctic Council's 2009 Arctic Marine Shipping Assessment.[167] It encourages the Coast Guard (through the Secretary of the Department of Homeland Security) to negotiate with other Arctic nations and execute agreements under IMO regarding marine safety, including the placement and maintenance of aids to navigation, oil spill prevention and response capability, tracking systems, and search and rescue.[168] The Act requires the Coast Guard to "promote safe maritime navigation by means of icebreaking where necessary, feasible, and effective."[169]

2.3.4. National Security Policy

The National Plan to Achieve Maritime Domain Awareness (MDA Plan),[170] one of eight plans formulated pursuant to the National Strategy for Maritime Security,[171] encourages the use and expansion of tracking systems and other tools to obtain comprehensive information about vessels located outside of the twelve-nautical mile territorial sea.[172]

A 2009 National Security Presidential Directive sets out the United States' Arctic policy.[173] It recognizes the need to work with the Arctic Council, IMO, and others on international agreements for environmental protection and to improve the safety and security of maritime

165. *See* 33 C.F.R. §§164.30-.38, .41, .43, .46, .72 (2013).

166. 33 C.F.R. §164.11(p) (2013) (listing eight factors to be considered in determining safe speed).

167. U.S. Coast Guard Authorization Act, PUB. L. NO. 111–281, § 307, 124 Stat. 2905 (2010) (entitled Arctic Marine Shipping Assessment Implementation). A new Coast Guard Authorization Act is issued each year to authorize appropriations to the Coast Guard.

168. *Id.* § 307(b)(1).

169. *Id.* § 307(e).

170. DEP'T OF HOMELAND SEC., NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS *i* (Oct. 2005), *archived at* http://perma.cc/J972-2ZSP.

171. *Id.*

172. The eight supporting plans are: 1) National Plan to Achieve Domain Awareness; 2) Global Maritime Intelligence Integration Plan; 3) Maritime Operational Threat Response Plan; 4) International Outreach and Coordination Strategy; 5) Maritime Infrastructure Recovery Plan; 6) Maritime Transportation System Security Plan; 7) Maritime Commerce Security Plan; and 8) Domestic Outreach Plan. *Id.*

173. GEORGE W. BUSH, NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) 66/HOMELAND SECURITY PRESIDENTIAL DIRECTIVE (HSPD) 25: ARCTIC REGION POLICY (2009), *archived at* http://perma.cc/ZBW4-V2U2.

transportation.[174] The Directive specifically refers to the need to consider ship routing and reporting systems, traffic separation and vessel traffic management schemes in Arctic chokepoints, underwater noise standards for commercial shipping, and pollution prevention and response standards.[175] It urges Congress to ratify UNCLOS.[176]

2.3.5. White House and Coast Guard Strategies for the Arctic Region

In 2013, both the White House and the Coast Guard released strategies for the Arctic region. The White House's strategy focuses on advancing US security interests, promoting responsible Arctic stewardship, and strengthening international cooperation.[177] One of the objectives of the strategy is to cooperate with other Arctic nations to advance common objectives in the Arctic region, including "the promotion of safe, secure, and reliable Arctic shipping, a goal that is best pursued through the International Maritime Organization in coordination with other Arctic states, major shipping states, the shipping industry and other relevant interests."[178]

The Coast Guard's strategy prioritizes improving awareness of maritime threats and hazards; modernizing governance by working with stakeholders and the International Maritime Organization; and broadening domestic and international partnerships to increase coordination, enhance efficiency, and reduce risk.[179]

Both the White House and the Coast Guard's Strategy call for accession to the Law of the Sea Convention.[180]

2.3.6. Endangered Species Act and the Marine Mammal Protection Act

The Endangered Species Act (ESA) is relevant to the protection of endangered and threatened species in the Bering Sea Region. ESA section 9 prohibits the Coast Guard or any other person from "taking" (harassing, harming, wounding, killing, etc.) any endangered species of fish or wildlife within the United States or its territorial sea.[181]

---

174. *Id.* at III(C)(1-2), III(F)(3).

175. *Id.* at III F(2-4).

176. *Id.* at III C(4).

177. THE WHITE HOUSE, NATIONAL STRATEGY FOR THE ARCTIC REGION (2013), *archived at* http://perma.cc/V29A-ZD88 [hereinafter WHITE HOUSE ARCTIC STRATEGY].

178. *Id.* at 10. As of this writing, the White House is working on an implementation plan for the Strategy.

179. USCG ARCTIC STRATEGY, *supra* note 4, at 22.

180. WHITE HOUSE ARTIC STRATEGY, *supra* note 177, at 2; USCG ARCTIC STRATEGY, *supra* note 4, at 22.

181. *See* 16 U.S.C. §§ 1538(a)(1)(B),1532(19), 1532(13) (1973) (prohibiting take,

The Marine Mammal Protection Act (MMPA) similarly protects marine mammals.[182] The National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) regulations implementing MMPA prohibit "the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal."[183]

NMFS has developed specific regulations to regulate close vessel approaches to large whales in Alaska and other areas. In 2001, NMFS issued a rule establishing a one-hundred-yard-approach limit for endangered humpback whales within 200 nautical miles of Alaska.[184] The rule also required vessels to travel at a "slow, safe speed" when near humpback whales.[185] The rule was mainly aimed at whale watchers, although NMFS specifically did not exempt commercial fishing vessels in transit.[186]

2.4. Alaska Law

Vessels could be subject to the laws of the State of Alaska if within three miles of state shorelines,[187] which include Little Diomede Island, St. Lawrence Island, Nunivak Island, and St. Matthew Island within the Bering

---

defining take, and including federal departments, instrumentalities, and agents in its definition of "person" for ESA purposes).

182. *See* 16 U.S.C. § 1372(a) (1972) (prohibiting the unauthorized "take" of all marine mammals).

183. 50 C.F.R. §§ 216.11, 216.3 (1978) (prohibiting take and defining take). Under ESA and MMPA, special permission for non-intentional take can be issued through an Incidental Take Permit or an Incidental Harassment Authorization. *See* ESA, 16 U.S.C. § 1539(a)(1)(B) (1973) (allowing the Fish and Wildlife Service or NMFS to issue permits to non-federal entities for "incidental take" of federally listed fish and wildlife species pursuant to a Habitat Conservation Plan submitted by the entity and approved by the agency); MMPA, 16 U.S.C. § 1371(a)(5)(D) (1972) (directing NMFS to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and a notice of a proposed authorization is provided to the public for review).

184. Regulations Governing the Approach to Humpback Whales in Alaska, 66 Fed. Reg. 29502 (May 31, 2001) (to be codified at 50 C.F.R. pt. 224).

185. *Id.* at 29503. The rule refers to the definition of "safe speed" in the Inland Navigational Rules (33 U.S.C. § 2006 (2003)) and the International Regulations for Preventing Collisions at Sea 1972 (COLREGs) (33 U.S.C. § 1602 (2006)).

186. *Id.* at 29504.

187. Under the Coastal Zone Management Act (16 U.S.C. §1453 (1972)), a state has title and ownership of waters out to three nautical miles. *See* 43 U.S.C. §1312 (1953) (providing for a three-nautical-mile seaward boundary of states). U.S.-flagged vessels would clearly be subject to Alaska law, to the extent it is not inconsistent with United States law and the Constitution. Foreign-flagged vessels could challenge a law if there is a perceived conflict between Alaska law and international law, particularly if there is a conflict with a U.S.-ratified convention.

Strait Region.[188]

The State of Alaska requires state-licensed pilotage in Alaskan waters for certain types of vessels, including some foreign-flagged vessels.[189] The State Marine Pilot Coordinator is able to monitor vessel traffic through the Automatic Information System,[190] although this does not provide information on whether vessels are complying with pilotage requirements. For the most part, compliance is voluntary.[191]

Alaska law requires vessels over 200 gross tons to carry a licensed VHF radiotelephone installation equipped with at least five channels.[192] Tank vessels transporting oil or petroleum products and self-propelled nontank vessels that are over 400 gross tons are required to have a vessel oil

---

188. ALASKA ADMIN. CODE title 12, § 56.100(16) (1971). There are federal pilotage requirement in waters beyond the three-mile mark, which are enforced by the Coast Guard.

189. *See* ALASKA STAT. § 08.62.160 (2012) ("A vessel subject to this chapter navigating the inland or coastal water of or adjacent to the state as determined by the board in regulation shall employ a pilot holding a valid license under this chapter."). Pursuant to ALASKA STAT. § 08.62.180 (2012), the following vessels are exempt from the pilotage requirement:

> (1) vessels subject to federal pilot requirements under 46 U.S.C. 8502 [covering coastwise, seagoing vessels not leaving or entering ports] except as provided in AS 08.62.185 [covering oil tankers of 50,000 dead weight tons or greater];
>
> (2) fishing vessels . . . registered in the United States or in British Columbia, Canada;
>
> (3) vessels propelled by machinery and not more than 65 feet in length over deck, except tugboats and towboats propelled by steam;
>
> (4) vessels of United States registry of less than 300 gross tons and towboats of United States registry and vessels owned by the State of Alaska, engaged exclusively . . . on the rivers of Alaska; . . . or in the coastwise trade on the west or north coast of the United States . . . and . . . Canada;
>
> (5) vessels of Canada . . . engaged in frequent trade between . . . Canada . . . and . . . Alaska;
>
> (6) pleasure craft of United States registry; [and]
>
> (7) pleasure craft of foreign registry of 65 feet or less in overall length . . . .

Federal pilotage regulations administered by the U.S. Coast Guard cover vessels not subject to state pilotage laws (including coastwise (transiting) self-propelled vessels and tank barges). 46 U.S.C. § 8502 (1983). Except for vessels in Prince William Sound, which must use pilots licensed by both the Coast Guard and Alaska, vessels subject to federal pilotage requirements are not subject to state pilotage requirements. *Id.* §§ 8502(g)-(h). The dual state-federal jurisdiction in Prince William Sound was created by the Oil Pollution Act of 1990, Pub. L. No. 101-380, § 4116 (1990) after the Exxon Valdez spill in an effort to "promote the level of competence necessary in the uniquely vulnerable Prince William Sound." H.R. REP. NO. 101-653, pt. 143, at 101 (1990) (Conf. Rep.). A similar argument could be made for dual accountability in the Bering Strait.

190. Interview with James McDermott, State of Alaska Marine Pilot Coordinator (Nov. 9, 2012). *See infra* discussion on AIS in Section 2.5.2.

191. *Id.*

192. ALASKA STAT. § 30.07.010 (2013).

discharge prevention and contingency plan.[193]

One source of potential legislation is the Alaska Arctic Policy Commission created in 2012.[194] The Commission was created based on a recommendation from the Alaska State Legislature's Northern Waters Task Force (NWTF), which was established in 2010 to study the effects of Arctic climate change on shipping, energy, and local industry.[195] NWTF's January 2012 report to the Legislature indicated support for the development of the Polar Code, the study of a potential vessel routing scheme for circumpolar marine traffic, and the extension of the Automatic Identification System (AIS) vessel tracking across the northern part of Alaska.[196]

3. SHIP COMMUNICATIONS SYSTEMS THAT COULD BE USED IN THE BERING STRAIT REGION

This section discusses systems and regimes that could be used to regulate ships in the Bering Strait Region, including a ship routing system, a ship reporting system, vessel traffic services, tracking systems, and other tools. A chart comparing these systems is included in Appendix 1. Currently there is no mandatory or voluntary IMO-approved ship routing system, ship reporting system, or vessel traffic service for the Bering Strait region or the Arctic marine area.

3.1. Ship Reporting System

In a ship reporting system, vessels report certain information to the coastal state maintaining the system, and the coastal state provides navigation information to the vessels.[197] SOLAS does not specify the type of information that must be reported, although reported information should be limited to information needed to serve the purposes of the system.[198]

---

193. *Does My Vessel or Railroad Need an Oil Discharge Prevention Contingency Plan?*, ALASKA DEP'T OF ENVTL. CONSERVATION DIVISION OF SPILL PREVENTION AND RESPONSE, http://dec.alaska.gov/spar/ipp/marine-vessels/need-contingency-plan.htm (last visited Dec. 15, 2013, *archived at* http://perma.cc/SBQ8-KGMB); ALASKA ADMIN. CODE title 18, §§ 75.005, 75.007, 75.400 (2013) (Responsibility, General oil pollution prevention requirements, Applicability).

194. H.R. Con. Res. 23, 27th Leg. (AK. 2012); *see also* Carey Restino, *Wanted: Arctic Policy Makers*, THE ARCTIC SOUNDER (May 11, 2012, 1:19 PM), www.thearcticsounder.com/article/1219wanted_arctic_policy_makers, *archived at* http://perma.cc/WNC4-UJDS.

195. *See Sponsor Statement: House Concurrent Resolution 23*, *Alaska Arctic Policy Commission*, THE HOUSE MAJORITY (Mar. 27, 2012), http://housemajority.org/spon.php?id=27hcr23, *archived at* http://perma.cc/Q4QA-ABHK.

196. NWTF REPORT, *supra* note 4, at 24-26.

197. *See Vessel Traffic Systems*, *supra* note 96.

198. SOLAS Guidelines, *supra* note 101, § 6.2.2.

This information generally includes the vessel name, radio call signs, position, speed, and course.[199] Some systems call for reports on any hazardous cargoes on board,[200] and the North Atlantic system requests reports on whale sightings.[201]

Ship reporting systems may be mandatory for use by all ships, certain categories of ships, or ships carrying certain cargoes.[202] IMO may also recognize a voluntary ship reporting system in international waters if the proposed system adheres as closely as possible to IMO regulations, guidance, and criteria.[203] A proposal for a ship reporting system may be submitted to IMO by any state that is party to SOLAS.[204] When two or more governments have a common interest in a particular area, they should formulate a joint proposal for the ship reporting system with integrated measures and procedures for co-operation between the jurisdictions of the proposing Governments.[205] If IMO adopts a system, its requirements become binding upon all commercial flag vessels of member states.[206] The proposing governments (rather than IMO) are responsible for implementing ships reporting systems.[207]

There are at least twenty-one IMO-approved, mandatory ship reporting systems,[208] including systems with environmental protection as an

---

199. SOLAS Guidelines, *supra* note 101, § 6.2.2.

200. *E.g.*, INTERNATIONAL MARITIME ORGANIZATION, *In the Straight of Gibraltar Traffic Separation Scheme Srea*, *in* SHIPS' ROUTEING (2010) [hereinafter Gibraltar Reporting System].

201. *E.g.*, INTERNATIONAL MARITIME ORGANIZATION, *Reporting Systems for Protection of Endangered North Atlantic Right Whales in Sea Areas of the North-Eastern and South-Eastern Coasts of the United States, in* SHIPS' ROUTEING (2010) [hereinafter Atlantic Whale Reporting System].

202. SOLAS Guidelines, *supra* note 101, § 2.1.

203. SOLAS, *supra* note 96, Reg. V/11.4; SOLAS Guidelines, *supra* note 101, § 5.2.

204. SOLAS Guidelines, *supra* note 101, § 6.1. The proposal should indicate the objectives and need for the proposed system; categories of ships required to participate in the system; information on environmental conditions; the area; the form, manner, and communication technology required for reports; measures and systems already in place; emergency measures; and compliance measures. SOLAS Guidelines, *supra* note 101, § 7.

205. SOLAS, *supra* note 96, Reg. V/11.5; SOLAS Guidelines, *supra* note 101, § 3.3.

206. SOLAS, *supra* note 96, Reg. V/11.7. The system can go into effect no earlier than six months after IMO adoption. SOLAS Guidelines, *supra* note 101, § 7.14.

207. SOLAS, *supra* note 96, Reg. V/11.6; SOLAS Guidelines, *supra* note 101, § 6.1.

208. As of 2010, IMO-approved ship reporting systems include (1) In the Gulf of Finland, (2) On the approaches to the Polish ports in the Gulf of Gdansk, (3) In the Storebælt (Great Belt) Traffic Area, (4) West European Tanker Reporting System, (5) Off Ushant, (6) Off Les Casquets and the adjacent coastal area, (7) The Dover Strait/Pas de Calais, (8) Off the south-west coast of Iceland, (9) Off Finisterre, (10) Off the Coast of Portugal, (11) In the Strait of Gibraltar Traffic Separation Scheme Area, (12) In the Strait of Bonifacio, (13) In the Adriatic Sea, (14) In the Straits of Malacca and Singapore, (15) In the Torres Strait region and the Inner Route of the Great Barrier Reef, (16) Ship Reporting System for the Papahānaumokuākea Marine National Monument PSSA, (17) In the Galapagos PSSA, (18)

objective[209] and systems in international straits.[210] None are in the vicinity of the Bering Strait, although two are near the Arctic,[211] and two are in US waters.[212]

Since 1958, the U.S. Coast Guard has maintained a worldwide voluntary ship reporting system known as AMVER (Automated Mutual Assistance Vessel Rescue System).[213] It is mainly used to assist with search and rescue. Participating vessels[214] send a sail plan to the AMVER computer center and report their locations every forty-eight hours until arriving at their port of call.[215]

3.2. Ship Routing System

A ship routing system requires vessels meeting certain criteria (i.e., vessel size or type of cargo carried) to use specific traffic routes or avoid certain areas.[216] Ship routing systems are more restrictive than reporting systems, since they allow a coastal state to actually control vessel routes.

Systems in Greenland Waters, (19) Off the North-eastern and South-eastern Coasts of the United States, (20) Off Chengshan Jiao Promontory, and (21) The Canary Islands. INTERNATIONAL MARITIME ORGANIZATION, SHIPS' ROUTEING, pt. G (2010).

209. *E.g.*, In the Storebælt (Great Belt) Traffic Area (BELTREP). INTERNATIONAL MARITIME ORGANIZATION, SHIPS' ROUTEING, pt. G, ¶9 (2010) [hereinafter Great Belt Reporting System] ("The objective of the VTS Authority is to facilitate the exchange of information between the shipping and the shore in order to ensure safe passages of the bridges, support safety of navigation and protection of the marine environment."); Gibraltar Reporting System, *supra* note 200, ¶9 ("The primary objective of the system is to facilitate the exchange of information between the ship and the shore and to support safe navigation and the protection of the marine environment."); In the Torres Strait region and the Inner Route of the Great Barrier Reef (REEFREP) INTERNATIONAL MARITIME ORGANIZATION, SHIPS' ROUTEING, pt. G, ¶9 (2010) [hereinafter Torres Strait Reporting System] ("The primary objective of the system is to facilitate the exchange of information between the ship and the shore and so support safe navigation and the protection of the marine environment."); Ship Reporting System for the Papahānaumokuākea Marine National Monument PSSA, ¶6.2 (establishing a ship reporting system in the Papahānaumokuākea Marine National Monument Particularly Sensitive Sea Area (PSSA) "[i]n recognition of the fragile environment in this area and potential hazards to navigation") (alteration added).

210. *E.g.*, Gibraltar Reporting System, *supra* note 200; In the Straits of Malacca and Singapore, *supra* note 208; Torres Strait Reporting System, *supra* note 209.

211. These systems are (1) Off the south-west coast of Iceland; and (2) Systems in Greenland waters. *See* INTERNATIONAL MARITIME ORGANIZATION, SHIPS' ROUTEING, pt. G (2010).

212. These systems are (1) Ship Reporting System for the Papahānaumokuākea Marine National Monument PSSA; and (2) Atlantic Whale Reporting System. *See id.*

213. *Automated Mutual Assistance Vessel Rescue System Fact Sheet*, U.S. COAST GUARD, http://www.amver.com/facts/FactSheet.pdf (last visited Feb. 15, 2014, *archived at* http://perma.cc/8Y5D-B34X).

214. *Id*. Any commercial vessel, regardless of nation or flag, over 1,000 gross tons on voyages of 24 hours or greater is encouraged to enroll and participate in AMVER. *Id.*

215. *Id*.

216. SOLAS Guidelines, *supra* note 101, § 1.2.

Ship routing systems can be established "to improve safety of life at sea, safety and efficiency of navigation, and/or increase the protection of the marine environment."[217] IMO ship routing systems may be either voluntary or mandatory for vessels[218] and may apply to "all ships, certain categories of ships or ships carrying certain cargoes."[219]

Routing measures may include traffic separation schemes, two-way routes, recommended tracks, deep water routes (for the benefit primarily of ships whose ability to maneuver is constrained by their draught), precautionary areas (where ships must navigate with particular caution), areas to be avoided, and other areas subject to specific regulations.[220]

A traffic separation scheme is "a routing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes."[221] While the original purpose of traffic separation schemes was to prevent collisions and improve the safety of international shipping, they can also be used for the protection of the marine environment[222] and to avoid collisions with whales[223] and other marine mammals.

An area to be avoided is "an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or by certain classes of ships."[224] These areas may be adopted for reasons of exceptional danger or especially sensitive ecological and environmental factors,[225] but generally cannot be adopted if they "would impede the passage of ships through an international strait."[226]

---

217. SOLAS Guidelines, *supra* note 101, §1.2; *cf.* SOLAS, *supra* note 96, Ch. V, Reg. 10.1.

218. SOLAS Guidelines, *supra* note 101, § 2.1.

219. SOLAS, *supra* note 96, Reg. V/10.1; SOLAS Guidelines, *supra* note 101, § 2.1.

220. *Ships' Routeing*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/ourwork/safety/navigation/pages/shipsrouteing.aspx (last visited Dec. 30, 2013, *archived at* http://perma.cc/76WK-S2G2) ("Routeing" is the British English spelling).

221. *Id.*; *see also* 33 C.F.R. § 167.5(b) (2001) (defining traffic separation scheme as "a designated routing measure which is aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes.").

222. SOLAS Guidelines, *supra* note 101, § 1.2 (providing that ships' routing systems may be used to "increase the protection of the marine environment")

223. *E.g.*, Atlantic Whale Reporting System, *supra* note 201.

224. *Ships' Routeing*, *supra* note 220; *See also* 33 C.F.R. § 167.5(a) (2001) (defining area to be avoided as "a routing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships or certain classes of ships.").

225. *Ships' Routeing*, *supra* note 220.

226. U.N. Secretary-General, *Law of the Sea*: *Rep. of the Secretary-General*, ¶94, U.N. Doc. No. A/50/713 (Nov. 1, 1995), *reprinted in* NETHERLANDS INSTITUTE FOR THE LAW OF THE SEA, INTERNATIONAL ORGANIZATIONS AND THE LAW OF THE SEA DOCUMENTARY

A precautionary area is "an area within defined limits where ships must navigate with particular caution and within which the direction of flow of traffic may be recommended."[227] A precautionary area can serve to control traffic flow around an area that may pose hazards to shipping or may complement a designated area to be avoided.[228]

Under United States law, a Regulated Navigation Area (RNA) is a "water area within a defined boundary for which regulations for vessels navigating within the area have been established."[229] RNAs may be established to provide for navigation safety when conditions require higher standards of control than those provided by the Navigation Safety Rules.[230] Such RNAs may require vessels to comply with specific criteria in order to enter the area.[231] RNAs may also be established to protect an environmentally sensitive area by limiting activities such as oil transfers that would create a high risk of harm.[232] RNAs may be expansive—one includes all of the navigable waters within the First Coast Guard District (the New England states).[233]

As indicated above in the section on UNCLOS, traffic separation schemes and other safety measures can be established for international

---

YEARBOOK (1998). "IMO will not adopt a proposed routeing system until it is satisfied that it does not impose unnecessary constraints on shipping." *Id.*; *cf.* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 806 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007) (referring to IMO's reluctance to adopt two mandatory Areas to be Avoided proposed by Sweden for a Particularly Sensitive Sea Area within Sweden's Exclusive Economic Zone; IMO's Subcommittee on Safety of Navigation found that the proposal did not sufficiently justify the establishment of mandatory areas and only approved voluntary areas). Thus, the state proposing the area to be avoided must be able to demonstrate the necessity for the area; otherwise, IMO may find that the area "impedes" navigation.

227. *Ships' Routeing*, *supra* note 220; *see also* 33 C.F.R. § 167.5(e) (2001) (defining precautionary area as "a routing measure comprising an area within defined limits where ships must navigate with particular caution and within which the direction of traffic flow may be recommended").

228. *See* International Maritime Organization, *General Provisions on Ships' Routeing*, Assembly Res. A.572(14) § 4.5.3 (Nov. 20, 1985), *archived at* http://perma.cc/6JDB-U57B (containing diagrams illustrating the various uses of a Precautionary Area designation).

229. *See* 33 C.F.R. § 165.10 (2013). RNAs are promulgated through a federal rule-making process pursuant to the Ports and Waterways Safety Act. *See* 33 C.F.R. § 165.9(b) (2010); U.S. COAST GUARD COMMANDANT, INSTRUCTION M16000.11: MARINE SAFETY MANUAL 1-44 (Oct. 11, 1996), *archived at* http://perma.cc/N848-BEVW, *cancelled* Oct. 10, 1997 [hereinafter MARINE SAFETY MANUAL]. Any person may request that a regulated navigation area be established by submitting a request to the Captain of the Port or District Commander with jurisdiction over the location. 33 C.F.R. § 165.5 (2010) (Establishment procedures). The request should indicate the proposed location; the effective date of the area; proposed activities and restrictions in the area; and the necessity for the area. *Id.* Safety zones and security zones are established in the same manner. *Id.*

230. MARINE SAFETY MANUAL, *supra* note 229, at 1-44.

231. MARINE SAFETY MANUAL, *supra* note 229, at 1-44.

232. MARINE SAFETY MANUAL, *supra* note 229, at 1-44.

233. *See* 33 C.F.R. § 165.100 (2010).

straits under articles 41 and 42(1)(a), but article 41(4) indicates that IMO must approve a traffic separation scheme before it can be put into force. Proposals for traffic separation schemes and other ship routing measures are submitted to IMO[234] in a similar manner as those for reporting systems,[235] whereby states with a common interest in a particular area submit joint proposals.[236] A proposal should demonstrate the need for the particular type of system and its expected impact on navigation.[237] Proposed routes should follow existing patterns of traffic flow as closely as possible.[238] Proposals intended to protect the marine environment should explain how the system would reduce the risk of damage and describe any environmentally sensitive areas.[239]

IMO-adopted routing systems are published in IMO's publication "Ships' Routeing."[240] Flag states that are parties to SOLAS must ensure adherence to IMO-adopted systems,[241] and a state that is "concerned" may monitor traffic in these systems.[242]

The Ports and Waterways Safety Act allows the Coast Guard to establish and maintain measures for controlling or supervising vessel traffic as well as for protecting navigation and the marine environment.[243] These measures, which may be implemented in US territorial waters or in areas covered by an international agreement, include ship reporting systems, ship routing systems, vessel traffic services, tracking systems, and speed limits.[244] In implementing and carrying out these measures, the Coast Guard

234. SOLAS Reg. V/10.2 recognizes IMO as the only international body for adopting ship routing systems as well as the guidelines, criteria and regulations associated with these systems. SOLAS, *supra* note 96, Reg. V/10.2. But SOLAS Reg. V/10.4 acknowledges that states may implement ship routing systems that have not been adopted by IMO, and encourages states to take into account IMO's guidelines, criteria and regulations on ship routing systems. SOLAS, *supra* note 96, Reg. V/10.4.

235. *See* SOLAS Guidelines, *supra* note 101, §§ 2-4.

236. SOLAS, *supra* note 96, Reg. V/10.5 (encouraging states to formulate joint proposals, and stating that IMO will disseminate details of the proposal to affected states); SOLAS Guidelines, *supra* note 101, § 3.3.

237. *See* SOLAS Guidelines, *supra* note 101, §3.1. SOLAS Section 3 of the SOLAS Guidelines describes each element of a proposal. The Guidelines also refer to Part A of the IMO publication, General Provisions on Ships' Routeing (GPSR) (authorized by IMO Assembly Res. A.572(14)). These provisions explain the details of establishing each type of system (i.e., a traffic separation scheme), design criteria, use of the system, and representation of systems on charts. *See* SOLAS Guidelines, *supra* note 101, § 2.2.

238. SOLAS Guidelines, *supra* note 101, §3.4.1.

239. SOLAS Guidelines, *supra* note 101, § 3.5.2.

240. *Ships' Routeing*, *supra* note 220.

241. Rule 10 of COLREGs prescribes the conduct of vessels when navigating through traffic separation schemes adopted by IMO. COLREGs, *supra* note 112.

242. SOLAS, *supra* note 96, Reg. V/10.6.

243. 33 U.S.C. § 1223(a) (2012).

244. *Id.*

must consider a number of factors, including environmental protection.[245]

An exception to the Coast Guard's authority to govern ship traffic applies to foreign vessels that are not entering or leaving US ports and are in (1) innocent passage through the territorial sea of the United States, or (2) transit through US navigable waters that form a part of an international strait.[246] But there is an exception to the exception: the Coast Guard can regulate these ships pursuant to an international treaty, convention, or agreement.[247] This probably means that if a vessel is simply traveling through the Bering Strait and not coming from or leaving a US port, the Coast Guard cannot regulate it unless there is an IMO-approved system in place.

3.3. Vessel Traffic Service

IMO defines a Vessel Traffic Service (VTS) as "a service implemented by a Competent Authority, designed to improve the safety and efficiency of vessel traffic and to protect the environment."[248] VTSs are somewhere between ship routing systems and ship reporting systems in terms of the control they give coastal states. Vessels are generally required to report the same information given in a ship reporting system, while the coastal state generally provides an information service[249] and may provide navigational assistance and/or traffic organization.[250] A VTS "should have

---

245. 33 U.S.C. § 1224 (2012). Factors include (1) the scope and degree of the risk or hazard involved; (2) vessel traffic characteristics; (3) port and waterway configurations; (4) the need for exemptions from equipment requirements for certain classes of small vessels; (5) the proximity of fishing grounds, oil and gas drilling and production operations, or any other potential or actual conflicting activity; (6) environmental factors; (7) economic impact and effects; (8) existing vessel traffic services; and (9) local practices and customs, including voluntary arrangements and agreements within the maritime community. *Id.* The Coast Guard is required to consult with and consider the views of representatives of the maritime community, ports and harbor authorities or associations, environmental groups, and other parties who may be affected by the proposed actions. *Id.*

246. 33 U.S.C. § 1223(d) (2012).

247. *Id.*

248. IMO Guideline for Vessel Traffic Services, Resolution A.857(20) (adopted Nov. 27, 1997), annex 1, § 1.1.1 [hereinafter IMO VTS Guidelines].

249. *See* IALA-AISM, EXPECTATIONS OF A VTS (Jan. 12, 2009) (stating that all VTS Centers provide information to vessels about conditions and events important to shipping and safety at sea, which may include information on the position, identity or intentions of other participating vessels in the VTS area; visibility or weather; the availability of berths or anchorages; or the status of aids to navigation, or any other information that could impact a vessel's safe transit).

250. IMO VTS Guidelines, *supra* note 248, §1.1.9 (explaining that a VTS generally provides an information service and may also provide navigational assistance and/or traffic organization); *see also* U.S. COAST GUARD COMMANDANT, INSTRUCTION M16630.3: VESSEL TRAFFIC SERVICES NATIONAL STANDARD OPERATING PROCEDURES §§ 2.B.2-B.3 (Aug. 18, 2009), *archived at* http://perma.cc/6ERT-HR4G [hereinafter COAST GUARD SOP] (providing

the capability to interact with the traffic and to respond to traffic situations developing in the VTS area."[251] VTSs are typically interlinked with other aspects of marine traffic management, such as traffic separation schemes and ship reporting systems.[252]

VTSs that provide navigational assistance or traffic organization services are typically associated with ports or harbors—their main concern is to oversee vessel traffic to and from the port or harbor.[253]

A VTS that only provides an information service is generally known as a coastal VTS[254] and is fairly similar to a ship reporting system.[255] Coastal VTSs and ship reporting systems both contribute to safety, navigation, and/or the protection of the marine environment.[256] Both have the right to interact with vessel traffic, providing information when necessary.[257] One difference is where they are allowed: SOLAS limits mandatory VTSs to the territorial seas of a coastal state,[258] and VTSs cannot alter the legal regimes governing international straits.[259] Mandatory ship reporting systems, on the other hand, can be approved by IMO for international waters and straits,[260] such as the Bering Strait.

Another difference concerns IMO approval, which is required for mandatory ship reporting systems. Governments planning and implementing VTSs should endeavor to follow relevant IMO guidelines but are not required to seek IMO approval for VTSs in their territorial waters, as long as the level of traffic or risk justifies the service and the service does not impair the rights to navigation in straits.[261] Approval would likely be needed for a system in an international strait that incorporates aspects of a VTS, such as the reporting system applicable to the Torres Strait.[262]

A VTS is particularly appropriate where there is high traffic density; traffic carrying hazardous cargoes; difficult hydrographical, hydrological, and meteorological elements; environmental considerations; or changes in

---

a similar explanation). Under the Coast Guard SOP, information, advice, and warnings fall within the navigation assistance service category. *Id.* §§2.B.2, 3.B.4. The Coast Guard SOP also indicates that the level of service may vary from one CGVTS to another. *Id.* § 2.B.

251. IMO VTS Guidelines, *supra* note 248, § 1.1.1.

252. *See* Section 3.1, *supra*, providing examples of ship reporting systems and traffic separation schemes with VTSs.

253. IMO VTS Guidelines, *supra* note 248, § 2.1.2.

254. IMO VTS Guidelines, *supra* note 248, § 2.1.2.

255. Captain Terry Hughes, *When is a VTS not a VTS?*, INTERNATIONAL MARITIME CONSULTANCY 3, http://www.maritime-vts.co.uk/VTSorNot.pdf (last visited Oct. 30, 2013, *archived at* http://perma.cc/X5HF-XJ8B).

256. *Id.*

257. *Id.*

258. SOLAS, *supra* note 96, Reg. V/12.3.

259. SOLAS, *supra* note 96, Reg. V/12.5.

260. *E.g.*, Torres Strait Reporting System, *supra* note 209.

261. SOLAS, *supra* note 96, Regs. V/12.2, 12.3, 12.5.

262. *See* discussion of Torres Strait Reporting System *infra* Section 4.1.

the traffic pattern resulting from developments in the area.[263]

As in the case of ship reporting and routing systems, IMO guidelines call for cooperation and agreement when two or more nations have a common interest in establishing a vessel traffic service for a given area.[264] A VTS established by multiple countries "should have uniform procedures and operations."[265] Once a VTS is established, parties to SOLAS "shall endeavour [sic] to secure the participation in, and compliance with, the provisions of vessel traffic services by ships entitled to fly their flag."[266]

U.S. Coast Guard Vessel Traffic Services can provide information; make recommendations; issue orders to vessels to specify times of entry, movement, or departure; restrict operations as necessary for safe operation under the circumstances; or take other action necessary to control vessel traffic and the safety of the port or of the marine environment.[267] Each service has its own requirements applicable to vessels within the service area.[268] Vessels that fail to comply with any applicable VTS requirement or regulations promulgated under the authority of PWSA may be denied entry into US navigable waters.[269]

Under US law, a VTS may provide for a "VTS Special Area"—a waterway within the area subject to the VTS where special operating requirements or restrictions apply.[270] VTS Special Areas are designed to preserve the safety of adjacent waterfront structures, ensure safe transit of vessels, or protect the marine environment.[271] The Coast Guard may

263. *See* IMO VTS Guidelines, *supra* note 248, § 3.2.2 (providing complete list of justifications for VTSs).

264. IMO VTS Guidelines, *supra* note 248, § 2.2.1.

265. IMO VTS Guidelines, *supra* note 248, § 2.2.1.

266. SOLAS, *supra* note 96, Reg. V/12.4.

267. 33 C.F.R. § 160.5(d) (2013); 33 C.F.R. §161.11(b) (2013) (in times of congestion, restricted visibility, adverse weather, or other hazardous circumstances, a Vessel Traffic Center can "control, supervise, or otherwise manage traffic, by specifying times of entry, movement or departure to, from, or within a VTS area").

268. *See* Vessel Traffic Service and Vessel Movement Reporting System Areas and Reporting Points, 33 C.F.R. §161 Subpart C, (2013) (describing rules for each service area in the United States); 33 C.F.R. §161.3 ("The provisions of this subpart shall apply to each VTS User and may also apply to any vessel while underway or at anchor on the navigable waters of the United States within a VTS area, to the extent the VTS considers necessary.").

269. 33 U.S.C. §§ 1228(a)(4), 1232(e) (2013); 33 C.F.R. §160.107 (2013). Even where a law expressly sanctions a departure from the ordinary rules, in the interest of safety, courts may narrowly construe the authority to depart; *see also* Crowley Marine Servs. Inc. v. Maritrans Inc., 447 F.3d 719, 727 (9th Cir. 2006) (interpreting COLREGs Rule 2(b) and limiting any departure from the rules for special circumstances to cases where the departure is "necessary to avoid immediate danger" and thus excluding departure by agreement).

270. *See* 33 C.F.R. §161.13 (2013) (VTS Special Area operating requirements); MARINE SAFETY MANUAL, *supra* note 229, at 1-45.

271. MARINE SAFETY MANUAL, *supra* note 229, at 1-45.

establish these areas by federal regulations.[272]

VTS Special Areas are similar to Regulated Navigation Areas, except VTS Special Areas may only be established by the Coast Guard Commandant within a VTS.[273] RNAs may be established by the district commander anywhere within the navigable waters of the United States.[274]

Vessel traffic centers operate vessel traffic services.[275] The Coast Guard now operates ten vessel traffic centers and participates in two others that are organized and staffed through public-private partnerships.[276] "VHF-FM communications network forms the basis of most major services."[277] Centers may also implement Vessel Movement Reporting Systems—mandatory reporting systems used to monitor and track vessel movements.[278] "A typical vessel movement reporting system (VMRS) requires covered vessels to provide the VTS with a sailing plan, periodic position reports, a final report, and notification if the vessel deviates from its sailing plan."[279]

3.4. Aids to Navigation

Parties to SOLAS are supposed to provide for Aids to Navigation when justified by the volume of traffic and degree of risk.[280] "Aids to

---

272. *See* 33 U.S.C. §1228 (2013) (providing authority for the Secretary to prescribe conditions for entry to ports in the United States); 33 C.F.R. §161 Subpart C (2013) (listing Vessel Traffic Service and Vessel Movement Reporting System Areas and Reporting Points).

273. MARINE SAFETY MANUAL, *supra* note 229, at 1-46.

274. MARINE SAFETY MANUAL, *supra* note 229, at 1-46.

275. 33 C.F.R. §161.2 (2013) (definition of vessel traffic center).

276. The ten VTSs operated by the Coast Guard are in New York, Louisville, Houston-Galveston, Berwick Bay (Morgan City), St. Mary's River, San Francisco, Puget Sound, Prince William Sound, Port Arthur, and Lower Mississippi River (New Orleans). The Coast Guard jointly operates VTS centers in Los Angeles-Long Beach and Tampa, Florida (and to some extent the Lower Mississippi River VTS) in conjunction with nongovernment entities; and it operates the Cooperative Puget Sound VTS with Canada. *See* 33 C.F.R. §161 Subpart C (2013); *Vessel Traffic Services*, U.S. COAST GUARD NAVIGATION CTR., http://www.navcen.uscg.gov/?pageName=vtsMain (last visited Nov. 7, 2013, *archived at* http://perma.cc/X5HF-XJ8B).

277. *Vessel Traffic Services*, *supra* note 276.

278. *See* 33 C.F.R. § 161.2 (2013) (defining Vessel Movement Reporting Systems). Vessel Movement Reporting Systems cover power-driven vessel of forty meters or more in length, while navigating; towing vessels of eight meters (approximately twenty feet) or more in length, while navigating; and vessels certificated to carry fifty or more passengers for hire, when engaged in trade. 33 C.F.R. § 161.16 (2013).

279. Craig H. Allen, *Hiding Behind "Tradition"? Should U.S. Vessel Traffic Centers Exercise Greater Direction and Control Over Vessels in Their Areas?*, 34 TUL. MAR. L.J. 91, 112 n.103 (2009).

280. SOLAS, *supra* note 96, Reg. V/13.1. Aids should be established based on the appropriate recommendations and guidelines of IALA and SN/Circ.107–Maritime Buoyage

Navigation can provide vessels with the same type of information drivers get from street signs, stop signals, road barriers, detours, and traffic lights."[281] These aids may be lighted structures, beacons, day markers, range lights, fog signals, landmarks, or floating buoys.[282] Each has a purpose and helps in determining location, getting from one place to another, or staying out of danger.[283]

The U.S. Coast Guard maintains a Federal Aids to Navigation System "consisting of visual, audible, and electronic signals which are designed to assist" vessel navigation.[284] "This system employs a simple arrangement of colors, shapes, numbers, and light characteristics to mark navigable channels, waterways, and obstructions adjacent to [the signals]."[285] The Coast Guard considers whether to establish new Aids to Navigation based on a number of factors, including the need to prevent collisions, the amount and nature of the traffic, the cost of the system compared to the public benefit, and the preservation of natural resources.[286]

Appendix 3 contains a list of Coast Guard-maintained aids to navigation in the Bering Strait Region and a map of buoys and towers maintained by NOAA and private entities.

3.5. Tracking Technology

Long Range Identification and Tracking (LRIT) systems and Automated Identification Systems (AIS) allow communication between vessels and on-shore observers, with the objective of avoiding collisions, maintaining safe distance from maritime hazards, locating vessels in distress, and assisting in search and rescue efforts. Under both systems, vessels carry hardware which actively transmits information regarding

---

System. *See* SOLAS, *supra* note 96, Reg. V/13.2.

281. *Aids to Navigation Team Kodiak*, U.S. COAST GUARD, http://www.uscg.mil/d17/antkodiak/ (last updated Sept. 8, 2008, *archived at* http://perma.cc/AJU8-7VRG).

282. *Id.*

283. *Id.*

284. *See Navigation Rules*, U.S. COAST GUARD, http://www.uscgboating.org/regulations/navigation_rules.aspx (last visited Nov. 9, 2013, *archived at* http://perma.cc/QC37-3KQM). The Coast Guard has authority under 14 U.S.C. § 81 to establish aids to navigation in the United States, the waters above the continental shelf, the territories and possessions of the United States, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located. The Coast Guard also permits private aids to navigation. 33 C.F.R. § 62.1 (2013).

285. *Aids to Navigation Team Kodiak*, U.S. COAST GUARD, http://www.uscg.mil/d17/antkodiak/ (last updated Sept. 8, 2008, *archived at* http://perma.cc/N7AA-PJNY).

286. U.S. COAST GUARD COMMANDANT, NOTICE 16500: AIDS TO NAVIGATION MANUAL ADMINISTRATION 3-5 (Mar. 2, 2005), *archived at* http://perma.cc/N92S-MSYJ (establishment criteria); *see also id.* at 2-2, 2-5 (discussing preparation of Form CG-3213, which is used to justify modifications to the Coast Guard's aids to navigation system).

vessel identify and location. LRIT enables observers to identify and track vessels over a broad geographic area through the use of satellites.[287] AIS is a line-of-sight broadcast system which transmits information over VHF radio bands and can be received by any receiver within the transmission range.[288] Both systems are required in US waters for certain vessels subject to US regulations.[289]

3.5.1. Long Range Identification and Tracking

SOLAS requires cargo vessels of 300 gross tons or more, passenger ships, high-speed craft, and mobile offshore drilling rigs to implement LRIT.[290] Through this system, vessels must automatically transmit their identity, their position in latitude and longitude, and the date and time of the position provided to an orbiting satellite.[291] Information received by the satellite is transmitted to land-based data centers in states that are entitled to receive the information under SOLAS, including the vessel's flag state, the port state the vessel will enter, and coastal states within 1,000 miles of the vessel.[292] The land-based data centers can then share the information with

287. 73 Fed. Reg. 23309, 23312 (Apr. 29, 2008) (codified at 33 C.F.R. pt. 169); *Long Range Identification and Tracking (LRIT)*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/blast/mainframe.asp?topic_id=905 (last visited Nov. 11, 2013, *archived at* http://perma.cc/UCY2-7N47).

288. *Automatic Identification System Overview*, U.S. COAST GUARD NAVIGATION CENTER, http://www.navcen.uscg.gov/?pageName=AISmain (last updated June 4, 2013, *archived at* http://perma.cc/6RPV-PD7Q).

289. 46 U.S.C. § 70114 (2013); 33 C.F.R. § 164.46 (2013) (requiring the following vessels to have AIS when on an international voyage: self-propelled vessels of sixty-five feet or more in length, other than passenger and fishing vessels, in commercial service; passenger vessels of 150 tons or more; all tankers; and vessels (other than passenger vessels or tankers) of 300 tons or more; and requiring the following vessels to have AIS when passing through a VTS: self-propelled vessels of sixty-five feet or more in length, other than fishing vessels and passenger vessels certificated to carry less than 151 passengers-for-hire, in commercial service; towing vessels of twenty-six feet or more in length and more than 600 horsepower, in commercial service; and passenger vessels certificated to carry more than 150 passengers-for-hire); 33 C.F.R. § 169.205 (2013) (requiring passenger ships, cargo ships of 300 tons or more, and mobile offshore units not engaged in drilling operations to transmit position reports while engaged on an international voyage).

290. SOLAS, *supra* note 96, Regs. V/19-1.4.1, 19-1.2.1, *amended by* IMO Res. MSC.202(81) (May 19, 2006).

291. SOLAS, *supra* note 96, Reg. V/19-1-5, *amended by* IMO Res. MSC.202(81) (May 19, 2006); *see generally Long-Range Identification and Tracking (LRIT)*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/OurWork/Safety/Navigation/Pages/LRIT.aspx (last visited Nov. 9, 2013, *archived at* http://perma.cc/H7W3-Z83U).

292. *See* SOLAS, *supra* note 96, Reg. V/19-1-8.1.3, *amended by* IMO Res. MSC.202(81) (May 19, 2006).

an international data exchange.[293] A foreign state is not entitled to receive information about a vessel located within the territorial waters of the vessel's flag state.[294] Also, states that are not a party to SOLAS are not entitled to receive information.[295]

Inmarsat-C, a satellite-based system that provides automatic transmissions by LRIT as well as manual transmissions,[296] is often used in ship reporting systems.[297]

US-flagged ships are generally required to transmit periodic[298] LRIT position reports to the U.S. National Data Center when traveling internationally.[299] Foreign-flagged ships must transmit LRIT position reports to the National Data Center after they announce their intention to enter a US port, or when the ship is within 1,000 nautical miles of the baseline of the United States.[300] Ships with AIS operating only within twenty nautical miles of the United States baseline are exempt from LRIT requirements.[301]

The non-profit organization Marine Exchange of Alaska provides LRIT in Alaska,[302] and it is available throughout the Bering Strait Region.[303]

---

293. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-337 MARITIME SECURITY: VESSEL TRACKING SYSTEMS PROVIDE KEY INFORMATION, BUT THE NEED FOR DUPLICATE DATA SHOULD BE REVIEWED 17 (2009), *archived at* http://perma.cc/5AZA-Y2QA [hereinafter GAO REPORT].

294. *See* SOLAS, *supra* note 96, Reg. V/19-1-8.1.4, *amended by* IMO Res. MSC.202(81) (May 19, 2006). For example, Canadian authorities are not entitled to receive information about U.S.-flagged vessels operating in the U.S. territorial sea.

295. SOLAS, *supra* note 96, Reg. V/19-1-8.1.

296. *Inmarsat-C, mini-C*, ZORA ADVANCED TECHNOLOGIES, http://www.zora.ru/eng/?a=show&id=265&nodec=1 (last visited Jan. 20, 2014, *archived at* http://perma.cc/FD85-JP5C).

297. *E.g.*, West European Tanker Reporting System (WETREP) ¶3.4.3, *supra* note 208 (Inmarsat-C and VHF radio calls); Papahānaumokuākea Marine National Monument PSSA (CORAL SHIPREP) ¶3.4.1, *supra* note 208 (Inmarsat-C and email); In the Galapagos PSSA (GALREP) ¶3.1, *supra* note 208 (Inmarsat-C, phone, fax, and email).

298. Under 33 C.F.R. § 169.230, a ship's LRIT equipment must transmit position reports at six-hour intervals unless a more frequent interval is requested remotely by an LRIT Data Center. 33 C.F.R. § 169.230 (2013). *See also* 33 C.F.R. § 169.210 (2013) (U.S. flag ships "engaged in an international voyage must transmit position reports wherever they are located.")

299. 33 C.F.R. § 169.205 (2013) (requiring passenger ships, cargo ships of 300 gross tonnage or more, and mobile offshore units not engaged in drilling operations to transmit position reports while engaged in an international voyage).

300. 33 C.F.R. § 169.210(b)–(c); *see also* GAO REPORT, *supra* note 293, at 5-6 n.5.

301. 33 C.F.R. § 169.235 (2013).

302. *See Marine Exchange of Alaska's Vessel Tracking System–Introduction*, MARINE EXCHANGE OF ALASKA, http://www.mxak.org/vtrack/vtrack_intro.html (last visited Nov. 9, 2013, *archived at* http://perma.cc/S6BR-ZVN6).

303. Interview with Ed Haney, Maritime Specialist, Marine Exchange of Alaska (Oct. 2,

The Global Maritime Distress and Safety System (GMDSS), based upon a combination of satellite and terrestrial radio services, facilitates search and rescue communications between ships and shore-based rescue coordination centers.[304] It has been used off the coast of Alaska, but polar areas north of the Bering Sea Range may be out of range of the satellites.[305] SOLAS requires all passenger ships and all cargo ships over 300 tons on international voyages to carry LRIT equipment that can interface directly with GMDSS.[306]

3.5.2. Automated Identification System

VHF-based AIS equipment automatically transmits information about a vessel to receivers within range of its broadcast, allowing vessels to be tracked when "operating in coastal areas, inland waterways, and ports."[307] AIS receivers may be located on vessels, land-based stations, or elsewhere.[308] Since AIS can be received by anyone with a receiver, data can easily be received by any country bordering a reporting area. The Marine Traffic Project and other non-government entities[309] publish AIS data from ships around the world on the Internet,[310] allowing anyone with Internet access to view AIS data.

For AIS to automatically and accurately transmit information, the vessel operator must program the system with data from the vessel's radio station license or other official documents.[311] Once programmed, an AIS

2012).

304. GAO REPORT, *supra* note 293, at 30-31; *Global Maritime Distress and Safety System*, U.S. COAST GUARD NAVIGATION CENTER, http://www.navcen.uscg.gov/?pageName=GMDSS (last updated Aug. 15, 2013, *archived at* http://perma.cc/5Y7F-6KGZ).

305. GAO REPORT, *supra* note 293, at 31.

306. SOLAS, *supra* note 96, Reg. IV; *see also* SOLAS, *supra* note 96, Reg. V/19-1-2.1 (requiring LRIT equipment onboard ships to interface directly to the ship borne Global Navigation Satellite System (GNSS) equipment or to have an internal positioning capability), *amended by* MSC.202 (81).

307. GAO REPORT, *supra* note 293, at 2.

308. *See* GAO REPORT, *supra* note 293, at 2; *Marine Exchange of Alaska's Vessel Tracking System–Introduction*, MARINE EXCHANGE OF ALASKA, http://www.mxak.org/vtrack/vtrack_intro.html (last visited Nov. 9, 2013, *archived at* http://perma.cc/6LDH-HB5Q).

309. *E.g.*, *About*, AISLIVE, http://www.aislive.com/Company.html (last visited Nov. 9, 2013, *archived at* http://perma.cc/5BDF-VBQR); *About*, FLEETMON, http://www.fleetmon.com/about (last visited Nov. 9, 2013, *archived at* http://perma.cc/ZZ32-EKYK).

310. *See Frequently Asked Questions*, MARINE TRAFFIC, http://www.marinetraffic.com/ais/faq.aspx?level1=160 (last visited Nov. 9, 2013, *archived at* http://perma.cc/9TTZ-ZM6Q); *see also Current Conditions in Ports*, MARINE TRAFFIC, www.marinetraffic.com/ais/datasheet.aspx?datasource=PORTS_CURRENT&level0=300 (last visited Nov. 9, 2013, *archived at* http://perma.cc/F7Q3-SU5M).

311. *AIS Frequently Asked Questions*, U.S. COAST GUARD NAVIGATION CENTER,

unit autonomously broadcasts two different AIS messages: a "position report" indicating the vessel's position, course, speed, navigation status; and a "static and voyage-related report," which includes the vessel's name, dimensions, and type, as well as its destination and estimated time of arrival.[312] Position reports are broadcasted every few seconds for moving vessels and every few minutes for anchored vessels.[313] Static and voyage-related reports are sent every six minutes.[314]

AIS can transmit a greater volume of data and does so more frequently than LRIT systems,[315] but over a more limited horizontal range (typically between fifteen and forty nautical miles).[316] The AIS signal has a much farther vertical range (around 200 nautical miles), and satellite-based AIS is now being developed to expand the system.[317] Satellite-based AIS does not require special technology to be added to ship fleets, and it could permit coastal authorities to review data on all ships in their region, even when the vessels are in mid-ocean.[318]

SOLAS requires all passenger vessels, all vessels of 300 gross tons and larger on international voyages, and all cargo vessels of 500 gross tons not on international voyages to be fitted with AIS equipment.[319] The Coast Guard refined these requirements to generally include commercial vessels sixty-five feet or longer, passenger vessels of 150 tons or more, and all tankers, either on international voyages or in VTS areas.[320] Vessels with

---

http://www.navcen.uscg.gov/?pageName=AISFAQ (last updated Oct. 30, 2013, *archived at* http://perma.cc/EUE5-GDHC).

312. *Id.*

313. *Id.*

314. *Id.*

315. Long Range Identification and Tracking of Ships, 73 Fed. Reg. 23309, 23312 (Apr. 29, 2008) (codified at 33 C.F.R. pt. 169); GAO REPORT, *supra* note 293, at 8, 24–25.

316. *Frequently Asked Questions*, MARINE TRAFFIC, http://www.marinetraffic.com/ais/faq.aspx?level1=160 (last visited Nov. 9, 2013, *archived at* http://perma.cc/5UAF-ML64) ("Normally, vessels with an AIS receiver connected to an external antenna placed on 15 meters above sea level, will receive AIS information within a range of fifteen to twenty nautical miles. Base stations at a higher elevation may extend the range up to 40–60nm…") (alteration added). The U.S. Coast Guard's Nationwide AIS installed in ports and along coastal areas receives data from up to twenty-four nautical miles offshore. *Nationwide Automatic Identification System*, U.S. COAST GUARD, http://www.uscg.mil/acquisition/nais/ (last updated Sept. 19, 2013, *archived at* http://perma.cc/JEY8-5KHX).

317. *AWT: First Service Using Global AIS for Accurate Vessel Monitoring*, MARINELINK.COM (Sept. 13, 2011), http://www.marinelink.com/news/monitoring-accurate340374.aspx, *archived at* http://perma.cc/CDL4-YMQR.

318. Peter de Selding, *Tracking Ships from Space: 2 Satellite Rivals Race To Become First in an Emerging Field,* DEFENSE NEWS (Apr. 10, 2011), http://www.defensenews.com/article/20110410/DEFFEAT01/104100302/Tracking-Ships-From-Space, *archived at* http://perma.cc/FX98-79QP.

319. SOLAS, *supra* note 96, Regs. V/19.2.4, 19.1.

320. *See, e.g.*, 46 U.S.C. § 70114 (2013) (requiring certain vessels to carry automatic identification system equipment); 33 C.F.R. § 164.46 (2013).

AIS that transmit information automatically are not required to manually submit position reports when in VTS areas.[321]

Much of the AIS in existence is commercially provided, although the U.S. Coast Guard has been implementing and expanding a Nationwide AIS (NAIS).[322] Since September 2007, the Coast Guard has operated NAIS at fifty-eight US ports and eleven coastal areas (not including Alaska),[323] which receive data from up to twenty-four nautical miles offshore.[324]

Some ship reporting systems rely on AIS networks to obtain information on ship identity and position, although VHF voice reports and other transmission mechanisms may be required to provide additional information.[325] One example is the ship reporting system for the international Strait of Gibraltar. This system requires VHF voice reports to be sent to centers in both Tarifa, Spain, and Tangier, Morocco.[326] Both these centers monitor traffic using radar as well as AIS.[327]

The commercial AIS receiver network established by the Marine Exchange of Alaska covers all traffic operating in the US Arctic region approaching or leaving the Bering Strait and the Aleutian Archipelago.[328] The network provides traffic reports and location data to the U.S. Coast Guard and state emergency responders of all ships approaching state waters.[329] AIS receivers are currently located in Gambell and Savoonga on St. Lawrence Island; Point Hope, Pont Lay, Wainwright, and Barrow in the North Slope Borough; Kivalina and Kotzebue in the Northwest Arctic Borough; Wales and Nome on Seward Peninsula; and between St. Michael and Emmonak south of Nome.[330]

---

321. *See* 33 C.F.R. §161.21 (2013).

322. GAO REPORT, *supra* note 293, at 9.

323. *See Acquisition Directorate*, U.S. COAST GUARD, http://www.uscg.mil/acquisition/map.asp (last updated Oct. 30, 2013, *archived at* http://perma.cc/K63E-M5QY) (showing states that have NAIS).

324. *Nationwide Automatic Identification System*, U.S. COAST GUARD, http://www.uscg.mil/acquisition/nais/ (last updated Sept. 19, 2013, *archived at* http://perma.cc/5W2-VFAD).

325. *E.g.*, Great Belt Reporting System, *supra* note 209, ¶¶3.1, 7.4.1.

326. Gibraltar Reporting System, *supra* note 200, ¶3.

327. Gibraltar Reporting System, *supra* note 200, ¶¶3.5, 7.

328. *Protecting U.S. Sovereignty: Coast Guard Operations in the Artic: Hearing Before the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation Hearing*, 112th Cong. 63(Dec. 1, 2011) (testimony of Mead Treadwell, Lt. Gov. Alaska); AIS coverage reaches the Bering Strait. Interview with Ed Haney, Maritime Specialist, Marine Exchange of Alaska (Oct. 2, 2012).

329. *Protecting U.S. Sovereignty: Coast Guard Operations in the Artic: Hearing Before the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation Hearing*, 112th Cong. 63 (Dec. 1, 2011) (testimony of Mead Treadwell, Lt. Gov. Alaska).

330. *Marine Exchange of Alaska's Vessel Tracking System–Introduction*, MARINE EXCHANGE OF ALASKA, http://www.mxak.org/vtrack/vtrack_intro.html (last visited Nov. 9,

3.5.3. Vessel Monitoring Systems for Fisheries

Since 1988, NMFS has used satellite-based Vessel Monitoring Systems (VMS) for enforcement and resource management purposes.[331] Aside from the vessel monitoring requirements for navigational and security purposes under SOLAS, certain fishing vessels are required to carry NMFS-approved transmitters that automatically transmit vessel position to NMFS through a communications provider.[332]

The position information is provided to NOAA in near real-time no matter where the vessel is located in the world.[333] The Marine Exchange of Alaska provides VMS communications in Alaska.[334]

3.6. Notice of Arrival

IMO's mandatory International Ship and Port Facilities Security Code (ISPS Code), which is linked to chapter XI-2 of the SOLAS Convention,[335] applies to all commercial vessels over 500 tons engaged in international trade, as well as mobile offshore drilling units.[336] The Code requires public and private ports and terminals to be secure, and ships may be required to provide notice and information to the maritime authorities of the host state.[337] Ships engaged in cargo operations, support services, or cruises in the Arctic have to comply with the ISPS Code and cooperate with port and terminal security.[338]

The United States has implemented advance notice of arrival

2013, *archived at* http://perma.cc/QV8Z-CWF7).

331. *See* U.S. COAST GUARD AND NOAA, REPORT TO CONGRESS: FISHERIES MANAGEMENT SYSTEMS AND DATA SHARING 2 (2007), *archived at* http://perma.cc/SXR3-9WVF.

332. 50 C.F.R. § 679.28(f)(1) (2013). Transmitters must be transmitting when fishing vessels are operating in reporting areas within the Exclusive Economic Zone of Alaska while engaged in fisheries requiring VMS pursuant to a Federal Fisheries Permit. *See id.* § 679.28(f)(6).

333. *See* U.S. COAST GUARD AND NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION, REP. TO CONG.: FISHERIES MANAGEMENT SYSTEMS AND DATA SHARING 2 (2007), *archived at* http://perma.cc/6QLQ-GVLB.

334. Interview with Ed Haney, Maritime Specialist, Marine Exchange of Alaska (Oct. 2, 2012).

335. This chapter was adopted at a 2002 convention at the same time that major revisions to SOLAS Chapter V (on ship reporting and routing) were adopted. *See IMO Adopts Comprehensive Maritime Security Measures*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/blast/mainframe.asp?topic_id=583&doc_id=2689#solas (last visited Feb. 15, 2014, *archived at* http://perma.cc/ELD7-5GEX).

336. AMSA REPORT, *supra* note 2, at 62; *FAQ on ISPS Code and Maritime Security*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/blast/mainframe.asp?topic_id=897#who (last visited Feb. 15, 2014, *archived at* http://perma.cc/3GQW-GLWV).

337. AMSA REPORT, *supra* note 2, at 62

338. AMSA REPORT, *supra* note 2, at 63.

requirements consistent with those of the ISPS Code.[339] The basic requirement is that notice must be given to the National Vessel Movement Center between twenty-four and ninety-six hours (depending on the duration of the trip) before arrival in a United States port.[340] The requirement applies to most US and foreign vessels over 300 tons bound for or departing from ports or places in the United States.[341] Notice can be submitted by internet, fax, or phone.[342]

3.7. Special and Protected Areas

3.7.1. Special Areas

MARPOL provides for "special areas" where mandatory measures may be adopted for pollution prevention.[343] To qualify as a special area under MARPOL, the area's oceanographic, ecological, and vessel traffic conditions must merit "special mandatory methods for the prevention of sea pollution."[344] Oceanographic conditions include circulation patterns, temperature, salinity stratification, low flushing rates, extreme ice, and adverse winds that could cause harmful substances to be concentrated or retained in the waters or sediments of the area.[345] Ecological conditions include depleted, threatened or endangered marine species; areas of high natural productivity; spawning, breeding and nursery areas; areas representing migratory routes for sea-birds and marine mammals; rare or fragile ecosystems; and critical habitats and/or areas of critical importance for the support of large marine ecosystems.[346] The area must experience a degree of traffic whereby conformance with the usual requirements of

339. AMSA REPORT, *supra* note 2, at 62; *see also* 33 C.F.R. 160 Part C; 68 Fed. Reg. 393292, 39294 (July 1, 2003) (Coast Guard found that the harmonization of U.S. regulations with the 2002 ISPS Code and the need to update notice of arrival requirements and institute measures for the protection of U.S. maritime security as soon as practicable furnished good cause for implementing an interim rule without advanced notice).

340. Navigation and Navigable Waters, 33 C.F.R. §160.212 (2003).

341. *See* Navigation and Navigable Waters, 33 C.F.R. § 160.202 (2005); 33 C.F.R. § 160.203 (2005).

342. *Id.* § 160.210.

343. *See Special Areas under MARPOL*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/OurWork/Environment/PollutionPrevention/SpecialAreasUnderMARPOL/Pages/Default.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/C6ZF-D56B).

344. MARPOL, *supra* note 119, at Annex I, Regulation 1(10), Annex II, Regulation 1(7), Annex V, Regulation 1(3) (each providing a similar definition of "special area"); *See also* MARPOL Guidelines, *supra* note 116 at Annex 1, § 2.1; *Special Areas under MARPOL*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/OurWork/Environment/PollutionPrevention/SpecialAreasUnderMARPOL/Pages/Default.aspx (last visited Feb. 15, 2014) (discussing special areas).

345. MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.4.

346. MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.5.

MARPOL would be insufficient to protect the area from pollution.[347] A state may also suggest other factors to justify Special Area designation.[348]

To obtain Special Area designation, a state must submit a proposal to IMO explaining how the area fulfills the criteria for the designation of special areas under the relevant MARPOL annex.[349] A Special Area can be proposed for the waters of one or more states, or even an entire enclosed or semi-enclosed area.[350] If two or more states have a common interest in the area, they would presumably submit a joint proposal.[351] If IMO approves the designation, it becomes effective only when there are adequate reception facilities in the area to receive the particular harmful substance from affected ships.[352]

A special area could be designated to implement specific pollution prevention measures in the Bering Sea Region, although this would have little impact on ship routing and communications. Regulations associated with Particularly Sensitive Sea Areas, discussed in the next section, would allow for more control over routing and communications.

3.7.2. Particularly Sensitive Sea Areas

A Particularly Sensitive Sea Area (PSSA) is "an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities."[353]

---

347. MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.6.

348. MARPOL Guidelines, *supra* note 120, at Annex 1, §§ 2.3, 2.8-2.10.

349. *See* MARPOL Guidelines, *supra* note 120, at Annex 1, § 3 (describing specifically what must be submitted, including a definition of the area proposed for designation, the area's precise geographical coordinates, the relevant annex, a description of the area's special characteristics and environmental pressures, existing protection measures, an analysis of how the area fulfills the criteria for the designation, and information on the availability of adequate reception facilities).

350. MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.2.

351. This is not specifically stated in the MARPOL Guidelines for Special Areas, although it is required for PSSAs and other IMO-approved designations. In 2009, 2010 and 2011 the Contracting Parties of the Helsinki Commission (Denmark, Estonia, European Union, Finland, Germany, Latvia, Lithuania, Poland, Russia, and Sweden) "submitted a joint proposal to IMO . . . to designate the Baltic Sea as a special area for sewage discharges from passenger ships." *Cooperation Platform on Port Reception Facilities in the Baltic Sea*, HELSINKI COMMISSION, http://helcom.navigo.fi/shipping/waste/en_GB/waste/ (last visited Feb. 15, 2014, *archived at* http://perma.cc/D68E-C67K) (alteration added). IMO adopted the proposal in 2011. *Id.*

352. MARPOL Guidelines, *supra* note 120, at Annex 1, § 2.7.

353. Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, International Maritime Organization Res. A.982(24) § 1.2 (Dec. 1, 2005) [hereinafter PSSA Guidelines].

PSSAs are designated along with specific measures (called "Associated Protective Measures"), which could include the designation of the same area as a Special Area subject to pollution controls; the adoption of a ship routing or reporting system near or in the area; or other measures aimed at protecting the area against environmental damage from ships, provided that they have an identified legal basis.[354]

To be identified as a PSSA, a proposed area must meet at least one of the ecological, socio-economic, or scientific criteria identified by IMO.[355] Ecological criteria include factors such as the uniqueness or rarity of the area; the presence of critical habitat in the area; the degree to which the area is representative of a certain habitat type; the area's diversity and productivity; the presence of spawning or breeding grounds or migratory routes in the area; or the naturalness, integrity, or fragility of the area.[356] Social, cultural, and economic criteria include the extent to which people depend on the ecological health of the area for social or economic purposes; the extent to which the area is important for the support of traditional subsistence or food production activities; or the presence of historical or archaeological sites.[357] Scientific and educational criteria include factors such as whether an area is of particular scientific interest; whether it can provide a baseline for monitoring studies; or whether it provides an outstanding opportunity for education.[358]

In addition to the above criteria, an application for designation of a PSSA must describe the area's vulnerability to damage from international shipping activities.[359] Vulnerability is based on vessel traffic characteristics, such as the type of maritime activities in the area, the types of vessels that use the area, the characteristics of the vessel traffic, and the extent to which vessels carry harmful substances.[360] Vulnerability also relates to natural characteristics, such as water conditions, weather conditions, and the presence of potential hazards like sea ice, tidal streams, or ocean currents.[361] Proposals for PSSA designation can withstand consideration of additional factors, including any history of accidents or stresses from other

354. *Id.* § 6; *see also* Jon M. Van Dyke & Sherry P. Broder, *Particular Sensitive Sea Areas; Protecting the Marine Environment in the Territorial Seas and Exclusive Economic Zones*, 40 DENV. J. INT'L L. & POL'Y 472, 478 (2011) (suggesting that measures may include vessel traffic services).

355. PSSA Guidelines, *supra* note 353, § 4.4.

356. PSSA Guidelines, *supra* note 353, §§ 4.4.1–4.4.11 (listing ecological criteria).

357. PSSA Guidelines, *supra* note 353, §§ 4.4.12–4.4.14 (listing social, cultural, and economic criteria).

358. PSSA Guidelines, *supra* note 353, §§ 4.4.15 –4.4.17 (listing scientific and educational criteria).

359. PSSA Guidelines, *supra* note 353, §5.1.

360. PSSA Guidelines, *supra* note 353, §§ 5.1.1—5.1.4 (listing vessel traffic characteristics).

361. PSSA Guidelines, *supra* note 353, §§ 5.1.5–5.1.7 (listing natural factors).

environmental sources.[362]

To establish a PSSA, a nation must submit an application to IMO proposing an area for PSSA designation and adopt associated protective measures.[363] If multiple countries have a common interest in an area, they should submit a coordinated proposal to IMO for consideration.[364] The PSSA and protective measures are effective as soon as possible after IMO approves the proposal.[365]

There currently are no PSSAs in Arctic waters.[366]

4. EXAMPLES OF SHIP REGULATORY SYSTEMS IN PLACE

4.1. Torres Strait—Ship Reporting System, Vessel Traffic Service, and Long Range Tracking Identification System

The Torres Strait is an international strait between Australia and

362. PSSA Guidelines, *supra* note 353, §§ 5.2.2, 5.2.4 (referring to other information that could be used).

363. *See* PSSA Guidelines, *supra* note 353, §3 (process for designation of PSSAs), §7 (procedure for designating PSSAs). IMO has issued several resolutions regarding PSSA designation in addition to the 2005 PSSA Guidelines. *See* Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Areas, International Maritime Organization Resolution A. 720 (17) (Nov. 6, 1991); Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective measures and Amendments to the Guidelines Contained in Resolution A.720(17), International Maritime Organization Resolution A. 885(21) (Nov. 25, 1999); Guidelines for the Designation of Special Areas Under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, International Maritime Organization Resolution A.927 (22) (Nov. 19, 2002) (Assembly Adoption of both Guidelines for the Designation of Special Areas under MARPOL and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas).

364. PSSA Guidelines, *supra* note 353, §3.1. IMO's Marine Environment Protection Committee analyzes the application, hears presentations from the nominating government(s), and receives reports from IMO technical groups. After doing so, it may designate the area "in principle" and inform the appropriate IMO committees and subcommittees. *See* PSSA Guidelines, *supra* note 353, §§ 8.3.1-8.3.3. The Marine Environment Protection Committee makes the final PSSA designation only after the appropriate committees or the IMO Assembly approve the associated protective measures for the area. PSSA Guidelines, *supra* note 353, § 8.3.4. If the associated protective measures are not approved, IMO may reject the proposal entirely or request that the proposing government submit new proposals for protective measures. *See* MARKUS J. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE MARINE AREAS Annex 8.3.1.4 (Jürgen Basedow et al. eds., 2008) (Doctoral thesis, University of Hamburg).

365. PSSA Guidelines, *supra* note 353, § 8.5.

366. *See Particularly Sensitive Sea Areas*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/OurWork/Environment/PollutionPrevention/PSSAs/Pages/Default.aspx (last visited Feb. 15, 2014, *archived at* http://perma.cc/P54D-LSXB) (listing currently designated PSSAs).

Papua New Guinea, in the waters along the Great Barrier Reef.[367] Water depths are often shallow, and the area is subject to monsoon climate with tropical storms and cyclones.[368] Traffic is not heavy relative to other international straits, but consists of many fishing vessels, tourist vessels and recreational craft that pose collision risks.[369]

IMO adopted Australia's proposal for a Torres Strait Ship Reporting System (REEFREP) in 1996 as a mechanism to enhance navigational safety, reduce the risk of shipping incidents and minimize ship pollution within the Great Barrier Reef and Torres Strait.[370]

The reporting system is mandatory for ships fifty meters or greater in length, ships carrying bulk hazardous or potentially polluting cargo, and ships towing or pushing vessels in the aforementioned categories.[371] Reports are sent to the REEFREP Vessel Traffic Service Center[372] at least two hours prior to entering the REEFREP area from the outside or when sailing from a port within the area.[373]

Within an hour of entering the REEFREP area, ships must provide a passage plan including vessel details, pilot information, and route/waypoint information.[374] Inmarsat-C LRIT is the primary mechanism for providing position reports.[375] Although vessels using this system must still comply with other VHF reporting requirements described in the REEFREP booklet.[376] Vessels are required to submit reports if they suffer damage or

---

367. Torres Strait Reporting System, *supra* note 209, ¶2.

368. *Great Barrier Reef and Torres Strait Vessel Traffic System (REEFVTS)*, AUSTRALIAN MARITIME SAFETY AUTHORITY, http://www.amsa.gov.au/navigation/services/gbr-and-torres-strait-vts/ (last visited Jan. 8, 2014, *archived at* http://perma.cc/DJX7-U7LV). Much of the navigable route through Torres Strait is confined in both width and depth. Entry to the western Torres Strait is through the Varzin Channel with a minimum width of 0.3 nm, and depth of 10.5 meters. *Torres Strait Particularly Sensitive Sea Area (PSSA): Strait Facts/Risk Assessment*, AUSTRALIAN MARITIME SAFETY AUTHORITY, http://www.amsa.gov.au/environment/legislation-and-prevention/torres-strait-pssa/strait-facts/ (last visited Jan. 8, 2014, *archived at* http://perma.cc/R9NW-KQ26). Passage through central Torres Strait is via Prince of Wales Channel with minimum width of 0.3 nm and depth of 11.0 meters. *Id.*

369. *Id.* (there are approximately 3000 transits of Torres Strait per year by vessels greater than 50 meters, consisting of bulk carriers (38%), general cargo (28%), containers (15%), and loaded tankers (12%)). *Id.*

370. AUSTRALIAN MARITIME SAFETY AUTHORITY, IMPORTANT CHANGES TO REEFVTS (effective July 1, 2011), *archived at* http://perma.cc/FFC4-YSXV.

371. Torres Strait Reporting System, *supra* note 209, ¶1.

372. The center is manned 24 hours a day, 365 days a year, and is equipped with a sophisticated traffic information management tool that integrates and assists in analyzing all VHF communications, radar, LRIT, and AIS information relayed to REEFCENTRE. Torres Strait Reporting System, *supra* note 209, ¶7.1.

373. Torres Strait Reporting System, *supra* note 209, ¶3.

374. Torres Strait Reporting System, *supra* note 209, ¶3.2.

375. Torres Strait Reporting System, *supra* note 209, ¶3.3.

376. Torres Strait Reporting System, *supra* note 209, ¶3.3.

significantly deviate from a route, course, or speed previously advised.[377]

The REEFREP system provides vessels information through Inmarsat-C and VHF voice communications[378] on ship traffic, including potentially conflicting traffic movements; navigational assistance; and maritime safety information, which includes unusual weather conditions.[379]

If reports are not submitted and the ship can be positively identified, then information will be passed to the relevant flag state for investigation and possible prosecution by that state.[380] A failure to report may also be investigated for breach of Australian laws relating to compulsory ship reporting.[381]

In 2004, IMO approved Australia's proposed amendments to REEFREP creating a new VTS (known as REEFVTS) concurrent with the reporting area.[382] REEFVTS now manages REEFREP from its vessel traffic center in Queensland, Australia,[383] obtaining from REEFREP information about ship characteristics and their intended passage through the region.[384] This information, together with the monitoring and surveillance systems used by REEFVTS, assists with the proactive monitoring of ship transit through the Great Barrier Reef and Torres Strait.[385]

REEFVTS is credited with reducing the number of groundings, from one per year between 1997 and 2003 to only one incident between the years 2004 and 2009.[386] Following a 2010 incident, IMO approved Australia's request to extend the boundaries of the REEFREP mandatory ship reporting system and allow REEFVTS to monitor the extended area.[387] The changes took effect in July 2011.[388]

The Torres Strait became a Particularly Sensitive Sea Area (PSSA) in

---

377. Torres Strait Reporting System, *supra* note 209, ¶3.4.

378. Torres Strait Reporting System, *supra* note 209, ¶5.

379. Torres Strait Reporting System, *supra* note 209, ¶4.

380. Torres Strait Reporting System, *supra* note 209, ¶9.1.

381. Torres Strait Reporting System, *supra* note 209, ¶9.1.

382. AUSTRALIAN MARITIME SAFETY AUTHORITY, IMPORTANT CHANGES TO REEFVTS (effective July 1, 2011), *archived at* http://perma.cc/LJG6-5AM7.

383. AUSTRALIAN MARITIME SAFETY AUTHORITY, GREAT BARRIER REEF & TORRES STRAIT VESSEL TRAFFIC SERVICE (REEFVTS) USER GUIDE 3, 4 (2011), *archived at* http://perma.cc/NS46-GYTU. Papua New Guinea does not have VTS centers that receive reports from the area, although it is entitled to receive this LRIT information under SOLAS Reg. V/19.1.8.1. SOLAS, *supra* note 96, Reg. V/19.1.8.1

384. *Great Barrier Reef and Torres Strait Vessel Traffic Service (REEFVTS),* AUSTRALIAN MARITIME SAFETY AUTHORITY, http://www.amsa.gov.au/navigation/services/gbr-and-torres-strait-vts/ (last visited Jan. 9, 2014, *archived at* http://perma.cc/L6KX-PQML)

385. *Id*.

386. AUSTRALIAN MARITIME SAFETY AUTHORITY, IMPORTANT CHANGES TO REEFVTS, (effective July 1, 2011), *archived at* http://perma.cc/ZYD8-6YGF.

387. *Id.*

388. *Id.*

July 2005, when IMO approved a joint proposal submitted by Australia and Papua New Guinea.[389] Two associated protective measures were approved by IMO for application in the Torres Strait—a new two-way shipping route and an extension of the marine pilotage system that has applied in the Great Barrier Reef area since 1990.[390]

4.2. United States East Coast—Ship Reporting System, Ship Routing System, and Long Range Tracking Identification System

Two areas off the east coast of the United States make up a unique ship reporting system designed to protect the endangered North Atlantic right whale from ship strikes. The United States proposed the system to IMO in 1998, based on the areas that form the whale's critical habitat.[391] The portion off the Massachusetts coast would be effective year-round, while the portion covering the whales' calving grounds off of the eastern Florida coast would operate from November 15 to April 15.[392] In support of its submission, the United States detailed the collision risks faced by the whales and the steps that it had taken under the Endangered Species Act and Marine Mammal Protection Act to protect the species.[393]

Critics of the proposal argued that it was inconsistent with the purpose of ship reporting systems and would create an undesirable precedent under the terms of the SOLAS Convention.[394] The United States

389. *Torres Strait Particularly Sensitive Sea Area*, AUSTRALIAN MARITIME SAFETY AUTHORITY, http://www.amsa.gov.au/environment/legislation-and-prevention/torres-strait-pssa/ (last visited Jan. 9, 2014, *archived at* http://perma.cc/7BT9-93QA). Australia and Papua New Guinea cited UNCLOS Art. 42 (allowing states to regulate marine traffic for navigational safety and pollution prevention) as a basis for extending compulsory pilotage. Robert C. Beckman, *PSSAs and Transit Passage - Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS*, 38 OCEAN DEV. & INT'L LAW 330 (2007). The joint proposal provided details about the unique and fragile ecosystem in the Torres Strait as well as hazards to shipping and the potential harm of a pollution incident in the strait. *Id.*

390. *Torres Strait Particularly Sensitive Sea Area,* AUSTRALIAN MARITIME SAFETY AUTHORITY, http://www.amsa.gov.au/environment/legislation-and-prevention/torres-strait-pssa/ (last visited Jan. 9, 2014, *archived at* http://perma.cc/SV4X-EQL6).

391. *See* INTERNATIONAL MARITIME ORGANIZATION SUB-COMMITTEE ON SAFETY OF NAVIGATION, SHIP REPORTING SYSTEMS FOR THE EASTERN COAST OF THE UNITED STATES, PROPOSAL SUBMITTED BY THE UNITED STATES (Apr. 10, 1998), *archived at* http://perma.cc/BLX8-EK6J, approved by IMO in December 1998, effective July 1999.

392. *See id*.

393. *Id*.

394. Jeffrey P. Luster, *The International Maritime Organization's New Mandatory Ship Reporting System for the Northern Right Whale's Critical Habitat: A Legitimate Approach to Strengthening the Endangered Species Act?* 46 NAVAL L. REV. 153, 164-65 (1999) (noting that the United States' original legal justification for the ship reporting system was exclusively focused on protecting the right whale, which many IMO member states argued was improper and inconsistent with the purpose of ship reporting systems).

modified its proposal to reduce concerns that the system would lead to identification of vessels involved in ship-strikes of whales for prosecution, restrain freedom of navigation, and cause a proliferation of similar systems.[395] Still, the United States contended that species-specific ship reporting was warranted given that (1) the species was immediately endangered with extinction; (2) major international shipping lanes passed through areas of critical habitat for the species' population; and (3) the greatest known threat to survival and recovery of the population was posed by ship strikes.[396] IMO ultimately agreed with these justifications,[397] and the reporting system went into effect in 1999.[398] The ship reporting system applies to ships of 300 tons or more entering Cape Cod Bay, Massachusetts Bay, and the Great South Channel east of Massachusetts, as well as the ninety nautical-mile stretch along the coasts of Florida and Georgia.[399] The northern reporting area covers much of a pre-existing traffic separation scheme servicing Boston.[400] When entering the system, ships are required to provide the ship name, call sign or IMO identification number, position, course, speed, route, and destination.[401] The Coast Guard center informs ships that they are entering an area of critical importance for the protection of the whale; that whales are present; and that ship strikes pose a serious threat to whales and may cause damage to ships.[402] Ships are requested to report any whale sightings and dead, injured, or entangled marine mammals to the nearest local Coast Guard station.[403] Communications generally take place through Inmarsat LRIT, HF, or VHF.[404]

The right whale ship reporting system is the first to protect a single species without significantly increasing vessel safety, since most large vessel whale strikes have little impact on the vessels themselves.[405]

In 2004, NMFS requested comments on proposed regulations aiming to reduce the likelihood of right whale ship strike mortalities.[406] The agency

---

395. *See id.* at 166.

396. *Id*.

397. *Id.* at 167.

398. *See* Atlantic Whale Reporting System, *supra* note 201 (detailing rules for system); *Mandatory Ship Reporting System for North Atlantic Right Whales*, NATIONAL OCEANIC AND ATMOSPHERIC ASSOCIATION, http://www.nmfs.noaa.gov/pr/shipstrike/msr.htm (last updated Feb. 25, 2013, *archived at* http://perma.cc/B8LL-RMRJ); *see generally* 33 C.F.R. pt. 169 (implementing ship routing system rules into United States law).

399. Atlantic Whale Reporting System, *supra* note 201, ¶2.

400. Atlantic Whale Reporting System, *supra* note 201, at Appendix 1. There is no traffic separation scheme for the southern reporting area. *See* Atlantic Whale Reporting System, *supra* note 201, at Appendix 2.

401. Atlantic Whale Reporting System, *supra* note 201, ¶¶3.2-3.3.

402. Atlantic Whale Reporting System, *supra* note 201, ¶4.1.

403. Atlantic Whale Reporting System, *supra* note 201, ¶4.4.

404. Atlantic Whale Reporting System, *supra* note 201, ¶5.

405. *See* Luster, *supra* note 394, at 166.

406. Advance Notice of Proposed Rulemaking (ANPR) for Right Whale Ship Strike

noted that despite its efforts to notify mariners of right whale sightings and ship strikes, impose mandatory ship reporting systems, collaborate with the Coast Guard, and take other measures, right whales were still being killed as a result of collisions with vessels.[407]

In 2005, environmental groups submitted a petition to NMFS for emergency rulemaking.[408] The petition included a request for a twelve-knot speed limit for all ships within twenty-five miles of all major East Coast ports during expected right whale high-use periods.[409] NMFS denied the request.[410] The environmental groups unsuccessfully sued the agency for denying emergency rulemaking and for other alleged violations of the Endangered Species Act regarding right whales.[411] But in 2008, NMFS adopted a final rule limiting the speed of most vessels to ten knots in certain areas at particular times of the year when whales are expected to be present.[412] NMFS has successfully enforced the required speed limits in a number of cases.[413]

In 2006, IMO approved a modification to an existing traffic separation scheme[414] for the Boston/New York area in order to move large ships away from waters with high concentrations of whales and areas

---

Reduction, 69 Fed. Reg. 30857 (2004).

407. *Id.* at 30858.

408. Petition for Initiation of Emergency Rulemaking To Prevent the Extinction of the North Atlantic Right Whale to the Secretary of Commerce, the Administrator of the National Oceanic and Atmospheric Administration, and the Assistant Administrator for Fisheries at NMFS (May 19, 2005), *cited in* Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 916, 926-928 (D.C. Cir. 2008) [hereinafter Emergency Rulemaking Petition].

409. *Id*. at 14.

410. *Id.*; *see* 70 Fed.Reg. 56884 (2005).

411. Emergency Rulemaking Petition*, supra* note 408, at 28.

412. *See* 73 Fed. Reg. § 60173 (2008); 50 C.F.R. § 224.105 (2011) (outlining effective times of year and geographic boundaries). The rule applies to all vessels (except those operated by or under contract to Federal agencies) that are 65 feet or greater in overall length in certain locations, and at certain times of the year along the east coast of the U.S. Atlantic seaboard. *Id.*

413. In 2012, NOAA announced the resolution of three cases involving large commercial vessels that violated speed limits in the right whale habitats. Randy Boswell, *Groups Call for Speed Limits in the Northwest Passage; Slowing Down Ships could Save Wildlife*, CALGARY HERALD, Mar. 17, 2012, at A20, *archived at* http://perma.cc/YQX9-DNVE. The owner of a German cargo ship agreed to pay 16 separate fines totaling $92,000 for repeated speeding violations off the Florida coast. *Id.* Two other ship owners agreed to pay their fines as well, and six more were still facing charges of breaking the 10-knot speed limit. *Id.* The ships had been clocked at up to 18 knots and were charged with $5,750 tickets for each infraction. *Id.*

414. The traffic separation scheme was originally adopted to service Boston in 1973 and amended in 1983 to include a precautionary area and connect with the New York traffic scheme. *See* UNITED STATES, PROPOSED AMENDMENT OF THE TRAFFIC SEPARATION SCHEME "IN THE APPROACH TO BOSTON, MASSACHUSETTS" submitted to the International Maritime Organization, Sub-Committee on Safety of Navigation ¶2, NAV 54/3/XX (Mar. 15, 2008), *archived at* http://perma.cc/AMR6-TNCB.

frequently transited by smaller fishing boats.[415] The lane shift added 3.75 nautical miles to the overall distance and ten to twenty-two minutes to each one-way trip.[416]

In 2009, IMO approved a voluntary seasonal area to be avoided off the northeastern coast for ships weighing 300 gross tons or more.[417] The area to be avoided corresponds to the whales' feeding area.[418] The restriction goes into effect each year between April and July, when the whales face the highest risk of ship strikes in this area.[419] The same year, IMO approved a proposal narrowing traffic lanes servicing Boston in order to reduce the threat of vessel collisions with right whales and other whale species.[420] Each lane is now 1.5 nautical miles wide.[421]

In 2012, NOAA developed an iPad and iPhone application that warns mariners when they enter areas of high risk of collision with the right whales.[422] The free application also provides information about right whale management measures, including speed limits, areas to be avoided, and the latest data about right whale detections, all overlaid on NOAA digital charts.[423] The application uses near real-time acoustic buoys that allow the locations of whale calls to be shown on a screen.[424]

Scientists estimate that the traffic control measures adopted for the North Atlantic have reduced the risk of collision by 60 to 80 percent.[425]

---

415. *See* Press Release, NOAA, NOAA & Coast Guard Help Shift Boston Ship Traffic Lane to Reduce Risk of Collisions with Whales (June 28, 2007), *archived at* http://perma.cc/6ER6-T8U8.

416. *Id.*

417. Press Release, NOAA, Changes in Vessel Operations May Reduce Risk of Endangered Whale Shipstrikes (May 26, 2009), *archived at* http://perma.cc/9YH4-TV6B.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* ("The width of the north-south portion of the lanes will narrow from a total of four miles to three miles.").

422. Press Release, NOAA, Stellwagen Bank National Marine Sanctuary, New iPad, iPhone app helps mariners avoid endangered right whales (Apr. 4, 2012), *archived at* http://perma.cc/LXN3-7DC8.

423. *Id.*

424. *Id.* (explaining that sound-detecting buoys detect right whale vocalizations within a five-mile radius and pass the signal via satellite to Cornell University's Bioacoustics Research Program where a technician confirms whether the sound corresponds to a right whale; if confirmed, Cornell triggers a message via AIS to the Whale Alert application, allowing the Whale Alert buoy icon to turn yellow on the map so that vessels can slow down and post a lookout to avoid collision).

425. *See id.* (the 2009 area to be avoided and revised traffic separation scheme were expected to reduce the relative risk of right whale ship strikes by about 74% during April-July (63% from the area to be avoided and 11% from the narrowing of the Traffic Separation Scheme)); Cooper, *supra* note 48, at 6 (at a 2012 Nome workshop on arctic shipping, NOAA wildlife biologist Brad Hansen suggested that the rerouting of ships to areas with lower densities of right whales has resulted in an 80% drop in ship strikes); WWF PARS

4.3 Northern Canada—Ship Reporting System and Vessel Traffic Service

Canada has implemented shipping rules that maximize its jurisdiction over Arctic waters; however, some have argued that the rules exceed the limits of international law. In 1970, Canada enacted the Arctic Waters Pollution Prevention Act to prevent pollution of its arctic marine environment.[426] The Act established a 100-nautical mile shipping safety control zone where passage through Arctic Canadian waters could only be achieved through compliance with certain construction, navigational, and operations standards.[427] In 2008, Canada extended the zone to 200 nautical miles, the outer limit of its exclusive economic zone.[428] While Canada has maintained that it has a right to regulate its internal waters, critics assert that the areas subject to the 2008 law are international straits, and that the law violates the regime for international straits established by UNCLOS.[429]

In 1977, Canada adopted a voluntary VTS, known as NORDREG, for the Canadian Arctic.[430] Canada's 2001 Shipping Act[431] established vessel traffic services (VTS) zones and allowed the Canadian Coast Guard to require vessel reporting and clearance.[432] The Coast Guard did not act on this authority until 2010, when it issued regulations[433] requiring large

---

COMMENTS, *supra* note 3, at comment 17 (citing Vanderlaan et al., *Reducing the Risk of Lethal Encounters: Vessels and Right Whales in the Bay of Fundy and on the Scotian Shelf*, 4 ENDANGERED SPECIES RESEARCH 283 (2008)) (modifications to the Bay of Fundy traffic separation scheme reduced the relative risk of collision with whales by up to 62 percent); *see also* REPORT OF THE JOINT IWC-ACCOBAMS WORKSHOP ON REDUCING RISK OF COLLISIONS BETWEEN VESSELS AND CETACEANS 14 (June 1, 2011), *archived at* http://perma.cc/CC6Z-MMWZ (wherever practical, vessels should be separated from whales using measures such as re-routing or areas/times to be avoided).

426. Arctic Waters Pollution Prevention Act, R.S.C., 1985, c. A-12 (Can.); *see also Chapter 5: Shipping in the Canadian Arctic,* CANADIAN COAST GUARD, http://www.ccg-gcc.gc.ca/e0010979 (last updated June 24, 2013, *archived at* http://perma.cc/Y7G7-GXA4) (describing the Act).

427. *See* Arctic Waters Pollution Prevention Act, R.S.C., 1985, c. A-12 (Can.); MATTHEW CARNAGHAN & ALLISON GOODY, POLITICAL AND SOCIAL AFFAIRS DIVISION OF THE CANADIAN PARLIAMENTARY INFORMATION AND RESEARCH SERVICE, CANADIAN ARCTIC SOVEREIGNTY (Jan. 26, 2006), *archived at* http://perma.cc/4R7Q-N4FL (detailing history of act).

428. PENNY BECKLUMB, INDUSTRY, INFRASTRUCTURE AND RESOURCES DIVISION OF THE CANADIAN PARLIAMENTARY INFORMATION AND RESEARCH SERVICE, LEGSILATIVE SUMMARY OF BILL C-3: AN ACT TO AMEND THE ARCTIC WATERS POLLUTION PREVENTION ACT (Dec. 12, 2008), *archived at* http://perma.cc/J4YL-RF9E.

429. *See generally* Ryan O'Leary, *Protecting the Arctic Marine Environment: The Limits of Article 234 and the Need for Multilateral Approaches*, 23 J. Env. L. & Prac. 287 (2012).

430. AMSA REPORT, *supra* note 2, at 66.

431. Canada Shipping Act, 2001, S.C. 2001, c. 26 (Can.).

432. *Id.* §§126, 136.

433. Northern Canada Vessel Traffic Services Zone Regulations, SOR/2010-127 (Can.) [hereinafter NORDREG Regulations].

vessels[434] to participate in a reporting system.[435] A ship's initial report to the Coast Guard must include the vessel's name, last port of call, position, course, speed, destination, estimated time of arrival, intended route, draught, cargo, and number of people on board.[436] An additional report must be provided if the vessel deviates from course; or if the vessel discovers another vessel in apparent difficulty, any obstruction to navigation, a malfunctioning aid to navigation, hazardous ice or weather conditions, or a pollutant in the water.[437] Reports are provided via radio, facsimile, email, telex, or telephone.[438]

Canada may impose fines up to C$100,000 ($90,440 – as of April 1, 2014) or imprisonment for one year against ship-owners that violate the reporting regulations.[439]

IMO has not approved NORDREG, and several states have contested NORDREG's mandatory nature at sessions of the IMO's Maritime Safety Committee.[440] Canada asserts that the mandatory reporting system is consistent with international law regarding ice-covered areas,[441] and that the waters subject to the system are internal waters within Canada's exclusive

---

434. The regulations apply to vessels of 300 tons or more, vessels engaged in towing or pushing another vessel where their combined tonnage is 500 tons or more, and vessels carrying a pollutant or dangerous goods or which are towing or pushing a vessel carrying such materials. *See id.,* at 3; *Vessel Traffic Reporting Arctic Canada Traffic Zone (NORDREG)*, CANADIAN COAST GUARD (June 2013), http://www.ccg-gcc.gc.ca/eng/MCTS/Vtr_Arctic_Canada, *archived at* http://perma.cc/4HL8-9D6Z [hereinafter *NORDREG*].

435. *See* NORDREG Regulations, *supra* note 433, at 7-8; *NORDREG*, *supra* note 434. A vessel must send a report just before entering any one of Canada's northern shipping zones, just after entering a zone, daily at 1600 Coordinated Universal Time, upon arrival at a port within a zone, and when leaving the zone. *Id*. Vessels issuing information automatically with LRIT do not have to manually issue the 1600 report. *NORDREG*, *supra* note 434.

436. NORDREG Regulations, *supra* note 433, at 7-8.

437. NORDREG Regulations, *supra* note 433, at 9; *NORDREG*, *supra* note 434.

438. *NORDREG*, *supra* note 434.

439. Leo Ryan, *Canada to Get Tough with Arctic Rules Offenders*, LLOYD'S LIST (July 8, 2010), http://www.lloydslist.com/ll/sector/regulation/article173180.ece, *archived at* http://perma.cc/KN59-KJ9Y.

440. Andreas Raspotnik, *Positive Unilateralism – An Effective Strategy to Protect the Canadian Arctic Environment or a Subtle Approach to Establish Sovereignty?*, THE ARCTIC INSTITUTE, CENTER FOR CIRCUMPOLAR STUDIES (Dec. 23, 2011), http://www.thearcticinstitute.org/2011/12/92743-positive-unilateralism-effective.html, *archived at* http://perma.cc/F435-9EVJ. Nations and international entities contesting the designation include U.S., EU, Germany and Singapore. *Id.*

441. *See NORDREG*, *supra* note 434. UNCLOS Art. 234 allows coastal states to adopt regulations for "the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance." UNCLOS, *supra* note 65.

jurisdiction (i.e., not international straits).[442]

4.4. Puget Sound/Juan de Fuca Region—Vessel Traffic Service

The Strait of Juan de Fuca, an eighty nautical mile long, narrow body of water between Washington State and Canada's Vancouver Island, serves as the primary connection between the Puget Sound and the Pacific Ocean.[443] It is approximately twelve nautical miles wide where it meets the Pacific Ocean and widens to sixteen nautical miles.[444] The Puget Sound, a bay with numerous channels and branches, extends approximately seventy nautical miles from the eastern end of the Strait of Juan de Fuca to the city of Olympia, Washington.[445] While navigation is relatively simple in good weather, the area is subject to strong winds and storms in the winter, and heavy fog from July to October.[446]

Vessel traffic in the Puget Sound/Juan de Fuca region is managed jointly by the Canadian and United States Coast Guards through a Vessel Traffic Service, a traffic separation scheme, and surveillance systems including radar, AIS, and closed circuit television.[447]

The United States and Canadian Coast Guards adopted an Agreement for a Cooperative Vessel Traffic Management System for the San Juan de Fuca Region on the Pacific Coast in 1979.[448] The purpose of the VTS is to provide for the safe and efficient movement of vessel traffic while minimizing the risk of pollution by preventing collisions and groundings.[449]

IMO approved the original Traffic Separation Schemes (TSS) associated with the VTS in 1981, and the routes have been modified several times since then to improve navigation.[450] The traffic separation scheme

442. Ryan, *supra* note 439, §166.

443. Richard Gilmore & Ronald E. Englebretson, *Puget Sound Area Heavy Weather Port Guide*, ch. 1 (1996), *archived at* http://perma.cc/5598-72DT.

444. *Id.*

445. *Id.*

446. 7 NOAA OFFICE OF COAST SURVEY, U.S. COAST PILOT 481-485 (44th ed., 2012), *archived at* http://perma.cc/HNZ-27S8 (Chapter 12: Strait of Juan De Fuca and Georgia, Washington).

447. U.S. COAST GUARD, VESSEL TRAFFIC SERVICE PUGET SOUND MANUAL *iv* (2007), *archived at* http://perma.cc/X8TT-KGD8 [hereinafter VTSPS MANUAL].

448. Exchange of Notes Constituting an Agreement on Vessel Traffic Management of the Juan de Fuca Region, 1221 U.N.T.S. 67 (Dec. 19, 1979).

449. *USCG: Purpose and Objective—Canada/U.S. Co-Cooperative Vessel Traffic System Agreement*, U.S. COAST GUARD, http://www.uscg.mil/d13/cvts/purposeandobjective.asp (last updated July 2, 2013, *archived at* http://perma.cc/78DE-5E4F) (describing purpose and objective of cooperative vessel traffic system for the Strait of Juan de Fuca region).

450. *See* Traffic Separation Schemes: In the Strait of Juan de Fuca and Its Approaches; in Puget Sound and Its Approaches; and in Haro Strait, Boundary Pass, and the Strait of Georgia, 75 Fed. Reg. 70818, 70819 (Nov. 19, 2010) (describing the history of the traffic separation scheme), *citing* IMO Circular COLREG.2/Circ.55 dated Dec. 15, 2004

provides for a western approach and lanes, a southwestern approach, northern lanes, eastern lanes, and a precautionary area.[451]

Three Vessel Traffic Centers manage traffic for the VTS. Puget Sound Vessel Traffic Service, which has been in place since 1972, is operated by the U.S. Coast Guard out of Seattle.[452] The other two centers have been operated by the Canadian Coast Guard since 1973. Toffino Traffic, located at Vancouver Island, manages vessels entering the Strait of Juan de Fuca from about forty miles out.[453] Seattle Traffic manages vessel traffic in both the Canadian and US waters of the Strait of Juan de Fuca and traffic headed to US ports.[454] Victoria Traffic manages vessels in both the Canadian and US waters bound for Canadian ports as they proceed north toward Victoria.[455] Vessels change their radio frequency to communicate with the appropriate center.[456] The three Vessel Traffic Centers communicate via a computer link and dedicated telephone lines to advise each other of vessels passing between their respective zones.[457]

Vessels subject to reporting requirements must provide an initial report, a position report at certain points in the system, and a final report.[458] The initial report indicates the vessel name, type, position, destination and estimated time of arrival, anticipated speed, intended route, time and point of entry into the Seattle Traffic Area, and any dangerous cargo on board,[459] while the final report indicates the vessel name and position when leaving the system.[460] Vessels must also report any deviations from the original schedule[461] and any accidents or dangerous situations, including pollution incidents and adverse weather conditions.[462]

Vessels are required to monitor radio frequencies applicable to the VTS including power-driven vessels of twenty meters or more in length; vessels of 100 gross tons or more carrying one or more passengers for hire;

(approving modifications) and IMO Circular COLREG.2/Circ.57 dated May 26, 2006 (approving modifications). The United States cooperated with Canada in conducting Port Access Route Studies and in preparing joint proposals for IMO approval. *Id.*

451. 33 C.F.R. §§ 167.1300, 167.1310 (2010).

452. *Cooperative Vessel Traffic Service*, U.S. COAST GUARD, http://www.uscg.mil/d13/dep/news/cooperative_vessel_traffic_servi.asp (last updated Mar. 31, 2013, *archived at* http://perma.cc/RX4Z-LM2Q) [hereinafter *CVTS Website*].

453. *Id*.

454. *Id*.; *USCG: Purpose and Objective—Canada/U.S. Co-Cooperative Vessel Traffic System Agreement*, U.S. COAST GUARD, http://www.uscg.mil/d13/cvts/purposeandobjective.asp (last updated July 2, 2013, *archived at* http://perma.cc/9KRE-DM66).

455. *CVTS Website*, *supra* note 452.

456. *CVTS Website*, *supra* note 452.

457. VTSPS MANUAL, *supra* note 447.

458. VTSPS MANUAL, *supra* note 447, at 1-4.

459. VTSPS MANUAL, *supra* note 447, at 1-4.

460. VTSPS MANUAL, *supra* note 447, at 1-4.

461. VTSPS MANUAL, *supra* note 447, at 1-4.

462. VTSPS MANUAL, *supra* note 447, at 1-5, 1-8.

and dredges or floating plants.[463] Power-driven vessels of forty meters or more in length; commercial vessels of eight meters or more in length, while engaged in towing; and vessels certified to carry fifty or more passengers for hire, when engaged in trade, are required to make voice reports to the appropriate Traffic Center.[464] All vessels must comply with the Convention for the International Regulations for Preventing Collisions at Sea (COLGREGs) provisions applicable to traffic separations schemes as well as any directive issued by a Vessel Traffic Center.[465] Approximately thirty times each year, vessel traffic service operators must intervene to prevent collisions.[466] They give direct navigational instructions to vessels in these close-call situations.[467]

4.5. Alaska Eskimo Whaling Commission Conflict Avoidance Agreement—Ship Reporting System and Routing System

Each year, the Alaska Eskimo Whaling Commission (AEWC) enters into a Conflict Avoidance Agreement with oil and gas industry companies whose operations and vessel traffic in the Beaufort and Chukchi Seas may interfere with subsistence hunting of the bowhead whale.[468] The Chukchi Sea is defined to include "all waters off the western and northern coasts of Alaska from Cape Prince of Wales to Point Barrow."[469] Cape Prince of Wales is on the western coast of Alaska directly adjacent to the Bering Strait.[470]

The Agreement establishes equipment and procedures for communications between whalers and industry participants; avoidance measures to be taken in the vicinity of subsistence hunting; emergency measures; and dispute resolution procedures.[471] The Agreement also lists contact information for representatives from each industry vessel and village as well as vessels that will be used in industry operations.[472]

All participants are required to monitor the same VHF radio

---

463. *CVTS Website*, *supra* note 452.

464. *CVTS Website*, *supra* note 452.

465. VTSPS MANUAL, *supra* note 447, at 1-2.

466. *CVTS Website*, *supra* note 452.

467. *CVTS Website*, *supra* note 452.

468. *E.g.*, CAA, *supra* note 26. The agreement operates during "Open Water Season"—the period of the year when ice conditions permit navigation or oil and gas operations to occur in the Beaufort Sea or Chukchi Sea. CAA, *supra* note 26, §§ 103(a)(12), 104(b)(2).

469. CAA, *supra* note 26, § 103(b)(2).

470. *Cape Prince of Wales – Alaska*, SATELLITEVIEWS.NET, http://www.satelliteviews.net/cgi-bin/g.cgi?fid=1399909&state=AK&ftype=cape (last visited April 4, 2014, *archived at* http://perma.cc/W6FG-BCAM).

471. CAA, *supra* note 26, § 102 (Purpose).

472. CAA, *supra* note 26, §§ 206, 401(a).

channel[473] and report by voice call to one of nine communication centers established under the Agreement and funded by the industry participants.[474] Additional VHF channels are assigned for communications within each village area and for industry vessels to communicate with communication centers.[475] Satellite phones serve as a backup to VHF.[476]

Every six hours, an industry vessel within the reporting area[477] must report to the closest communication center[478] the vessel's name, operator, and owner; the project the vessel is working on; the vessel's location, speed, and direction; and plans for vessel movement between the time of the call and the time of the next call.[479] Vessels must also report any unsafe or unanticipated ice conditions; and any significant change in plans, such as an unannounced start-up of operations or significant deviations from an announced course, so that the communication center can notify all whalers of the changes.[480]

Each industry participant must hire a Marine Mammal Observer to work on board of certain types of vessels.[481] The observer is responsible for keeping a lookout for bowhead whales and/or other marine mammals in the vicinity of the vessel, to assist the vessel captain in avoiding harm to these animals.[482] When the vessel is in the vicinity of a whaling area, the observer is responsible for communicating with communication centers and with whalers by VHF radio.[483]

Whaling captains report to a communication center when they launch

---

473. CAA, *supra* note 26, § 202(c)(1).

474. CAA, *supra* note 26, § 203(b). Industry participants also fund the whalers' VHF equipment. CAA, *supra* note 26, § 205(a).

475. CAA, *supra* note 26, § 205(a-b).

476. CAA, *supra* note 26, § 205(a)(6).

477. The reporting area for most vessels starts once they pass Cape Prince of Whales and enter the Chukchi Sea. *See* CAA, *supra* note 26, § 104(b)(2) (indicating the general scope as the Beaufort and Chukchi Seas); CAA, *supra* note 26, § 103(b) (defining the Chukchi Sea as the "all waters off the western and northern coasts of Alaska from Cape Prince of Wales to Point Barrow"). The 2012 Agreement added a new Section 505, which requires vessels to report if they are unable to reach a point south of 59 degrees North latitude by November 15 due to weather or ice. The 2012 Agreement also added a new Section 602, requiring vessels engaged exclusively in geophysical (seismic) operations to report when forty miles off the coast of Alaska. Email from Earl Comstock, AEWC Counsel, to author (Oct. 2, 2012).

478. The Agreement refers to the "appropriate" communication center, which is understood to mean the closest communication center. Email from Earl Comstock, AEWC Counsel, to author (Oct. 2, 2012).

479. CAA, *supra* note 26, §§ 202(a)(1), 602(a)(1).

480. CAA, *supra* note 26, §§ 202(a)(2), 602(a)(2).

481. CAA, *supra* note 26, § 201(a). These vessels include most vessels used for seismic operations, ice-breakers, and the lead vessel in a group of barge or transit vessels. *See* CAA, *supra* note 26, § 103(a)(14).

482. CAA, *supra* note 26, § 201(b)(4).

483. CAA, *supra* note 26, §§ 201(b)(3-7), 202(c)(3).

their boats from shore and again when they return to shore.[484] They report their whaling camp location, boat location, general direction of travel, plans for the following day, and any industry vessels not observing the Agreement's provisions on avoiding conflicts.[485]

If industry vessels and whaling boats are in the same area at the same time,[486] the communication center plots the information received on maps and alerts industry vessels of any possible conflicts.[487] If whaling boats and vessels fail to report on time, the communication center attempts to contact the boat or vessel to obtain the required information.[488]

Vessels are required to avoid areas of active or anticipated whaling activity.[489] Vessels are advised (though not required) to stay at least five miles offshore to avoid whaling areas.[490] If weather and ice conditions permit, vessels must transit on the eastern side of St. Lawrence Island and no closer than ten miles from the island's shore.[491]

The speed limit for vessels "in the proximity of feeding whales or whale aggregations" is ten knots.[492]

If a vessel inadvertently approaches within a mile of observed bowhead whales, it must take additional precautions, which may include

> reducing vessel speed to less than five knots within 900 feet of the whale(s);
> steering around the whale(s) if possible;
> operating the vessel in such a way as to avoid separating a group of whales;
> operating the vessel to avoid causing a whale to make multiple changes in direction; and
> checking the waters immediately adjacent to the vessel(s) to ensure that no whales will be injured when the propellers are engaged.[493]

The Agreement goes beyond communications between vessels at sea.

---

484. CAA, *supra* note 26, § 202(b).

485. CAA, *supra* note 26, § 202(b).

486. In an effort to adhere to the Conflict Avoidance Agreement, oil and gas operators generally time operations to avoid interfering with the active whaling periods. For instance, during the fall 2012 whaling season, Shell Oil Co. did not start its operations near the villages of Kaktovik and Nuiqsut until whalers in these villages completed their hunts. Email from Johnny Aiken, AEWC Director, to author (Nov. 13, 2012).

487. CAA, *supra* note 26, § 203(d)(4-5).

488. CAA, *supra* note 26, § 203(d)(3).

489. CAA, *supra* note 26, §§ 202(c), 501(a).

490. CAA, *supra* note 26, §§ 302(c), 501(a).

491. CAA, *supra* note 26, § 505.

492. CAA, *supra* note 26, §§ 302(d), 501(c).

493. CAA, *supra* note 26, §§ 302(e), 501(d).

Prior to the open water season (when operations and shipping take place), industry participants must meet with subsistence hunters to discuss the timing and location of planned activities.[494] Participants also meet after the season to review results of the operations and discuss any concerns.[495] Further, industry participants must provide advance notice regarding geophysical equipment sound signature tests and agree with AEWC on the location of testing.[496] Each industry participant must implement a monitoring plan to collect data on the potential effects of its oil and gas operations on fall migrating bowhead whales.[497] Geophysical activity is prohibited at certain times and locations where whales are expected to migrate.[498] Waste discharge is prohibited in certain areas.[499]

In the event of an emergency, vessels are supposed to notify a communication center, which, in turn, is supposed to notify the nearest vessels and search and rescue authorities.[500]

5. RECOMMENDATIONS FOR BERING SEA COMMUNICATIONS SYSTEM

5.1. Factors to Consider

There are environmental, social, safety, economic, legal, and other factors to consider in designing and implementing a communications system for the Bering Strait Region.

From the perspective of those concerned with maintaining a healthy, resilient Arctic ecosystem, marine wildlife, and coastal communities, the degree to which a system can protect bowhead whales and other species is a primary concern. The system should be designed to avoid collisions with whales, prevent pollution, and ensure rapid response to any pollution incident. Since subsistence hunters depend on marine mammals for their nutritional needs and way of life, human welfare is closely linked to environmental concerns. To address these concerns, the adopted system should provide for protected areas corresponding to whale habitat and subsistence areas. Vessel speed should be controlled where whales and other marine mammals are present.

Navigational safety is another important concern for all stakeholders. Navigational safety avoids the risk of collisions and accidents that could

494. CAA, *supra* note 26, § 108(c).
495. CAA, *supra* note 26, § 108(a-b).
496. CAA, *supra* note 26, § 402(b).
497. CAA, *supra* note 26, § 403.
498. CAA, *supra* note 26, § 502 (providing geographical descriptions and dates pertaining to activity prohibitions).
499. CAA, *supra* note 26, § 503(a).
500. CAA, *supra* note 26, § 107(a).

harm mariners as well as the environment. Any system will have to account for the unique navigational hazards associated with the region and ensure that vessels are able to respond to changing weather and ice conditions. The system will also have to account for the region's remote location and lack of infrastructure.

The ratio of costs to benefits will significantly influence whatever decision the U.S. Coast Guard reaches through its Port Access Route Study.[501] Relative to other parts of the United States, operational costs in the Bering Strait Region are likely to be high. The Coast Guard may be unwilling to invest in a new control center in the region unless and until the traffic is comparable to other areas.[502] While the traffic is rising, one day of traffic in the Port of San Francisco is currently equal to a year of traffic in the Bering Strait.[503] If the Coast Guard is not willing to establish a permanent presence in the Bering Strait Region, it will be difficult to implement a vessel traffic service or ship reporting system. The system would have to rely on routing measures, aids to navigation, and/or automatic tracking measures that could be monitored from afar. Particularly if the Coast Guard does not establish any communication centers in the region, it may make sense to coordinate with and build on the existing system used by the Alaska Eskimo Whaling Commission.

International law and the interests of other countries will limit the ability of the United States to impose unilateral requirements on vessels in the Bering Strait Region. The United States would have difficulty asserting the right to regulation under UNCLOS Article 234 for ice-covered seas, since it has not ratified the convention. Even if the United States does ratify UNCLOS, its justification for unilateral regulations under Article 234 would be weaker than Canada's argument for regulating its Arctic waters. First, there is significantly less ice in the Bering Strait Region than in Canada's Arctic waters. Second, the Bering Strait Region is not entirely under US jurisdiction—much of it is in the Russian Exclusive Economic Zone. As the only connection between the Pacific and Arctic Oceans for thousands of vessels transiting through the area, the Bering Strait is likely to be considered an international strait subject to the right of transit passage under Article 38 of UNCLOS. If this is the case, the United States probably

501. *See* Bering Strait PARS, *supra* note 3, at 68 (asking for comments on which measures are most cost-effective).

502. *See* Alex DeMarban, *As Arctic Shipping Grows, Native Hunters Aim to Protect Marine Mammals*, ALASKA DISPATCH (Mar 14, 2012), http://www.alaskadispatch.com/article/arctic-shipping-grows-native-hunters-aim-protect-marine-mammals?page=full, *archived at* http://perma.cc/ZV77-VFPS (referring to comments made by U.S. Coast Guard Capt. Adam Shaw that Native hunters should not expect a navigation center on Little Diomede soon).

503. *See id*.

could not deny passage to non-compliant vessels,[504] although it could attempt to coerce compliance with threats of fines and sanctions. Finally, it is still not clear whether Canada's assertion of jurisdiction over Arctic waters will be allowed to stand under international law.

The Bering Strait's status as international does not mean that the United States is without any power. It can cooperate with Russia to submit a proposal to IMO for a ship reporting or routing system, just as Australia and Papua New Guinea did for the Torres Strait. In connection with either of these systems, the United States could cooperate with Russia to implement a vessel traffic service, similar to that implemented by the United States and Canada for the Juan de Fuca region. Regardless of what system the United States decides to implement, Russian participation will be essential for obtaining IMO approval and for ensuring that marine mammals will be protected throughout the entire region.[505]

There are likely to be competing political concerns that pit the right of navigation against environmental protection and other interests. In the past, the United States has championed the right of unimpeded navigation and opposed efforts by Canada and others to assert control over navigation.[506] On the other hand, the United States initiated a one-of-a-kind ship reporting system for the primary purpose of protecting North Atlantic right whales.[507]

---

504. *See* THE ICJ REPORTS, CORFU CHANNEL CASE, JUDGMENT OF APRIL 9, 1949 (1949) (concluding that an international strait "should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace"); Restatement (Third) of Foreign Relations Law § 513 cmt. j (1987) (a coastal state may not suspend transit passage through an international strait).

505. *See* DeMarban, *supra* note 502 (referring to comments made by U.S. Coast Guard Capt. Adam Shaw suggesting that without Russian participation, IMO likely will reject any scheme for the Bering Strait as insufficient). According to Coast Guard Cmdr. James Houck, as of March 2012, the Coast Guard was having difficulty finding someone to work with in the Russian Ministry of Transport. DeMarban, *supra* note 502.

506. Bering Strait PARS, *supra* note 3, at 68, (emphasizing that "[t]he designation of [traffic separation schemes] recognizes the paramount right of navigation over all other uses in the designated areas.") (alterations added); *see also* Press Release, U.S. Dep't of State, U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction, (Apr. 15, 1970), *cited in* J.A. Beesley & C.B. Bourne, *Canadian Practice in International Law During 1970 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 9 CAN. Y.B. INT'L L. 276, 287-88 (1971); Jason M. Krajewski, *Out of Sight, Out of Mind? A Case for Long Range Identification and Tracking of Vessels on the High Sea*, 56 NAVAL L. REV. 219 (2008), *citing* THE UNITED STATES NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶¶2-32 (1997) (the Navy maintains the U.S. right to freedom of navigation by making diplomatic assertions of customary international law rights and backing up those assertions through freedom of navigation operations).

507. The United States also decided to pursue a PSSA around its Pacific islands despite opposition from the U.S. Department of Defense. *See* Raul Pedrozo, *Is it Time for the United States to Join the Law of the Sea Convention?*, 41 J. MARITIME L. & COMM. 151, 160 (2010) (Department of Defense objected strenuously on national security grounds to President

If the United States seeks greater control over what seems to be an international strait for purposes of environmental protection, this may weaken its ability to object to other coastal states seeking greater control.

Vessel owners and those that hold mineral rights in the region or north of it may oppose any system that appears to add an additional regulatory burden. That said, oil and gas operators may support a system that coordinates with the existing AEWC Conflict Avoidance Agreement, since they are already voluntarily complying with the Agreement's reporting requirements.

5.2. Potential Regulatory Tools

Most ship regulatory systems make use of multiple tools, ranging from ship reporting requirements to traffic separation schemes. All of these measures could be useful in the Bering Strait Region. Which one(s) will be implemented likely depends most on cost and political will. Regardless of what measures are implemented, the input of Bering Strait Region stakeholders should be sought. These stakeholders may benefit from the increased development opportunities associated with ship traffic, but have much to lose if ship pollution and accidents damage their subsistence resources.[508]

5.2.1. Ship Reporting System

It seems unlikely that the Coast Guard would be willing to implement a full ship reporting system similar to those adopted by IMO in other areas. Particularly if the Coast Guard does not plan to invest in vessel communication centers in the area, it should consider working with NOAA and AEWC to expand the existing system operating through the Conflict Avoidance Agreement.[509] The Coast Guard could consider training those who currently operate the AEWC Communication Centers on Coast Guard

---

Bush's 2009 marine monument proclamations and to NOAA's proposal to the International Maritime Organization to designate a Pacific Particularly Sensitive Sea Area).

508. The Institute of the North has been awarded a National Park Service grant to create a Bering Strait Messengers Network, which aims to increase communication between communities in the region with local, state, and federal government bodies and Russian communities. *See* Diana Haecker, *Institute of the North Proposes Bering Strait Communications Network*, THE NOME NUGGET, (Jan. 13, 2013) at 4. This network may help channel local stakeholder voices and could increase the communications infrastructure in the area.

509. Email from Earl Comstock, AEWC Counsel (Oct. 2, 2012) (AEWC would likely be open to discussing expansion of its system to include all vessels and Coast Guard participation, particularly if the expanded system would lead to greater Coast Guard search and rescue assistance. If the system is expanded, AEWC would encourage employing local people at communication centers to assist in communications with Iñupiaq-speaking whaling crews.).

rules, and having Coast Guard personnel temporarily stationed at these centers during ice-free periods when significant traffic is expected. The AEWC Communication Centers currently operating within the Bering Strait Region include those in Point Lay, Point Hope, Kivalina, Wales, and Gambell/Savoonga. In most situations, the centers operate out of modest buildings (such as the Point Lay Whaling Captains' Association building) that will likely need additional communications equipment and space to accommodate Coast Guard personnel.

Alternatively, the United States could choose to invest in one or more new communication centers in the Bering Strait Region and require ships to report to this center at certain points. While it is possible that the communication center could be implemented outside of the region (at the Coast Guard's station in Dutch Harbor, for example), this distance would limit the means of communication. AIS would not work unless monitored by Internet based on actual receivers in the area. Also, if the Coast Guard operates from a distant center, it will not be able to provide timely aid to vessels and may have greater difficulty ensuring compliance with reporting requirements. If the United States chooses to implement a system that is not coordinated with the existing AEWC system, then it should consider entering into an agreement with AEWC and/or other local representatives to share real-time information pertinent to subsistence hunters. It should also consider employing people who have worked at AEWC Communication Centers or are from the region, as these people would have a better understanding of the hazards mariners are likely to face and the barriers to communication.

In order to make a ship reporting system mandatory, the United States would have to cooperate with Russia and submit a joint proposal to IMO.[510] If the United States is unable to obtain Russia's cooperation or IMO's approval, it should consider having a voluntary reporting system.

Consideration should also be given to which kind of vessels would participate in the system. Participation should be broad enough to include ships with a potential for causing pollution or collision, but small vessels used for subsistence hunting and fishing should be exempt from the more expensive and time-consuming requirements.

Appendix 2 contains an outline for a simple IMO-ship reporting system, based on IMO-approved reporting systems contained in *Ships' Routeing* (2010 edition). The footnotes in the outline explain how Conflict Avoidance Agreement reporting requirements could be integrated into the system.

510. *See supra* Section 3.1 (Ship Reporting Systems).

5.2.2. Ship Routing System

A routing system could be established to avoid the most environmentally sensitive areas and subsistence areas in the region. This could be accomplished with relatively little investment through a voluntary system that is not patrolled. With greater investment, a mandatory system could be established along with a vessel traffic service and patrol to ensure that vessels are following the routing measures. Routing measures could include a mandatory or voluntary traffic separation scheme and Areas to be Avoided.

Depending on the volume of the traffic, multiple lanes may be required to separate deep draft vessels from shallower boats, which could probably be routed along lanes that are closer to the shore. Special lanes and/or or crossing points could be established for local fishing and whaling boats. In addition to traffic lanes, there could be waiting areas to the north and south of the strait for vessels to safely anchor in the event they are not ready to pass through the strait or need shelter from a storm.

To integrate routing requirements from the Conflict Avoidance Agreement, vessels in transit could be required to stay at least five miles offshore.[511] Vessels could also be required to transit on the eastern side of St. Lawrence Island, no closer than ten miles from the island's shore.[512]

Speed restrictions could be required for areas where bowhead whales or other animals are likely to be present. Under the Conflict Avoidance Agreement, the speed limit for vessels "in the proximity of feeding whales or whale aggregations" is ten knots.[513] If the United States adopted speed restrictions of ten knots in these areas, the risk of bowhead whale mortalities from collisions would be significantly reduced.[514]

---

511. CAA, *supra* note 26, §§ 301(c)(2-3), 501(a)(2-3).

512. CAA, *supra* note 26, § 505.

513. CAA, *supra* note 26, §§ 302(d), 501(c).

514. *See* MMC PARS COMMENTS, *supra* note 7, at 2, 5 (recommending that a vessel speed limit of 10 knots be considered if vessel traffic is likely to overlap with peak bowhead migration); REPORT OF THE JOINT IWC-ACCOBAMS WORKSHOP ON REDUCING RISK OF COLLISIONS BETWEEN VESSELS AND CETACEANS 24 (June 1, 2011), *archived at* http://perma.cc/9WS7-KV45 (rerouting should be the first option considered, but where separating vessels from whales is not practical, measures to reduce speed should be considered); Vanderlaan, A. S. M. & C. M. Taggart, *Vessel Collisions with Whales: the Probability of Lethal Injury Based on Vessel Speed*, 23(1) MARINE MAMMAL SCIENCE 144 (2007), *archived at* http://perma.cc/8TM8-MNV9 (noting that the probability of a lethal injury from a strike drops below 50% at 11.8 knots, whereas the probability approaches 100% at speeds above 15 knots); Randy Boswell, *Groups Call for Speed Limits in the Northwest Passage; Slowing Down Ships Could Save Wildlife*, CALGARY HERALD, A20, Mar. 17, 2012, *archived at* http://perma.cc/N3Y2-W9RF (citing NOAA statement that the likelihood of a whale fatality due to ship strike increases from around 45% to 75% when vessel speed increases from 10 to 14 knots; chance of death at 17 knots is 90%); Regulations Governing the Approach to Humpback Whales in Alaska, 66 Fed. Reg. 29,502, 29,503 (May

As with a ship reporting area, the United States would not be able to establish an effective mandatory routing system without the involvement of Russia and IMO,[515] though it could establish a voluntary system.

5.2.3. Vessel Traffic Service

The United States would have difficulty implementing a stand-alone VTS for the Bering Strait, since VTSs are only allowed in territorial waters and the Bering Strait is probably an international strait. A VTS could be implemented in connection with an IMO-approved ship reporting and/or routing system if justified by the volume of traffic in the region.[516] Currently, the volume of traffic in the Bering Strait is low compared to other international straits. Still, a VTS could be justified by the risk of collisions between ships and marine mammals due to the narrowness of the strait and the likelihood that certain species of marine mammals will be present at specific times of the year.

As would be the case for a ship reporting system, the United States would have to coordinate the location of the VTS center(s) with Russia. There could be a single VTS center in the United States similar to the control center in Queensland for the Torres Strait. Or there could be multiple VTS centers, with at least one on each side, as is the case for the San Juan de Fuca region.

Alternatively, the United States could pursue a voluntary VTS for the Bering Strait or a mandatory VTS for areas outside of the strait itself that are part of the US territorial sea and experience significant volumes of traffic.

5.2.4. Aids to Navigation

Currently, there are only a handful of Coast Guard-maintained navigational aids and NOAA-maintained buoys in the vicinity the Bering Strait.[517] Particularly if the United States decides not to have a reporting system or vessel traffic service through which it can warn mariners of dangers, additional navigational aids and buoys should be established in the area. The United States should also consider installing buoys capable of detecting bowhead whale calls, although this would require a significant

---

31, 2001) (citing David W. Laist, et al., *Collisions between Ships and Whales*, 17(1) MARINE MAMMAL SCIENCE 35–75 (Jan. 2001) ("[A] study of worldwide occurrences of whales struck by ships indicated that most lethal or severe injuries to whales struck by vessels occurs by ships traveling 14 knots (kts) or faster")).

515. *See supra* Section 3.2 (Ship Routing System).

516. *See* SOLAS, *supra* note 96, Reg. V/12.2 (2002) (parties to SOLAS can arrange to establish a VTS where, in their opinion, the volume of traffic or the degree of risk justifies such services). The Torres Strait VTS (REEFVTS) is an example of a VTS that was implemented in connection with an IMO-approved ship reporting system.

517. AMSA REPORT, *supra* note 2, at 109; *see also* Appendix 3, *infra*.

investment and it is not clear how well this type of buoy would tolerate the conditions in the Bering Strait Region.[518]

5.2.5. Tracking Systems

LRIT and/or AIS, both of which are already required for most large vessels by SOLAS and US law, could be integrated into a ship reporting system, although AIS has a limited horizontal range. Both systems could be supplemented with VHF voice communications.

5.2.6. Designation of Areas with Special Regulations

Areas subject to protective regulations could be designated through a variety of means. Under US law, the Coast Guard could designate Areas to be Avoided or Precautionary Areas within US waters.[519] NMFS could designate critical habitat for the bowhead whale within the US 200-mile Exclusive Economic Zone,[520] although the likelihood of this seems slim.[521]

---

518. *See* Kirk Lombardy, *United States Coast Guard Assists NOAA in Deploying Great Lakes NOAA Weather Buoy*, NOAA (Nov. 2, 2013), www.erh.noaa.gov/cle/office/localinterest/bristol1.htm, *archived at* http://perma.cc/U24E-GF4V (stating that "during the winter months, smaller and likely less expensive buoys" are used in Lake Erie "due to the ravaging effects of ice that develops on the lake" and that "larger buoys would likely be lost to the ice if left out on the lake during the winter."); NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, *Short Range Aids to Navigation*, *in* 72 AMERICAN PRACTICAL NAVIGATOR 5, *archived at* http://perma.cc/SQP3-AEKY (buoys are subject to a variety of hazards including severe weather, collision, mooring casualties, and electrical failure); *but see Weather Buoys*, HURRICANES, SCIENCE AND SOCIETY, www.hurricanescience.org/science/observation/ships/weatherbuoys/ (last visited Feb. 15, 2014, *archived at* http://perma.cc/7B3J-HET2) (describing buoys located from the Bering Sea to the South Pacific, stating that buoys can face rough weather and are anchored using anything from chains in shallow waters to heavy-duty, polypropylene rope in deeper waters).

519. *See* 33 U.S.C. § 1223 (2006) (authority for implementing vessel routing measures); 33 C.F.R. Part 167 (1983) (defining Areas to be Avoided and Precautionary Areas; describing where these areas exist in U.S. waters).

520. Although the bowhead whale has been listed as an endangered species since 1970, critical habitat has not been designated. *See* Endangered Species Conservation Act of 1969, 35 Fed. Reg. 8495 (June 2, 1970) (designating bowhead as endangered species); Final Determination on a Petition to Designate Critical Habitat for the Bering Sea Stock of Bowhead Whales, 67 Fed. Reg. 55,767 (Aug. 30, 2002) (denying petition to designate critical habitat); NMFS, Notice of determination issuance of an incidental take authorization, 75 Fed. Reg. 49,709, 49,756 (Aug. 13, 2010) ("There is no critical habitat designated in the U.S. Arctic for the bowhead whale and humpback whale.").

521. In 2002, NMFS rejected a petition to designate critical habitat for bowhead whales based on its determination that the designation of critical habitat for species listed prior to 1978 is discretionary. The decline and reason for listing the species was overexploitation by commercial whaling, and habitat issues were not a factor in the decline. Habitat degradation was not shown to have a negative impact on the increasing population. The population was increasing, and existing laws and practices adequately protected the species and its habitat.

Even if NMFS does designate critical habitat, it may decide not to require any restrictions on barge and vessel movement beyond the requirement for federal agencies to consult with NMFS under ESA Section 7.[522] This was the case for NMFS's critical habitat designation for Cook Inlet beluga whales in 2011.[523]

A stronger option would be for the United States to work with Russia on an IMO proposal that incorporates areas subject to special regulation. This could be accomplished through a ship routing system that designates certain Areas to be Avoided. It could also be accomplished through IMO's adoption of Particularly Sensitive Sea Areas (PSSAs) subject to associated protection measures, including speed restrictions. These measures could include those listed in the Conflict Avoidance Agreement for approaching whales,[524] marine mammal observers,[525] and zones prohibiting certain types of waste discharge.[526]

Much of the Bering Strait Region could qualify for designation based

---

See Endangered and Threatened Species; Final Determination on a Petition to Designate Critical Habitat for the Bering Sea Stock of Bowhead Whales, 67 Fed. Reg. 55,767 (Aug. 30, 2002). This determination could change, however, if the habitat is demonstrated to be significantly degrading due to climate change and increased ship traffic.

522. Section 7(a)(2) of the Endangered Species Act requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2) (1988) (alterations added); *see also* 50 C.F.R. §402.14(a) (2013) (discussing the consultation requirement).

523. *See* NOAA, Endangered and Threatened Species: Designation of Critical Habitat for Cook Inlet Beluga Whale, Final rule, 76 Fed. Reg. 20179 (Apr. 11, 2011).

524. The rules could integrate Conflict Avoidance Agreement measures prescribed for vessels approaching a whale, including reducing vessel speed to less than 5 knots within 900 feet of whales; steering around whales if possible; operating vessels in a manner that avoids separating a group of whales; operating vessels to avoid causing a whale to make multiple changes in direction; and checking the waters immediately adjacent to vessels to ensure that no whales will be injured when the propellers are engaged. *See* CAA, *supra* note 26, §§ 302(e), 501(d).

525. Legal authority for requiring marine mammal observers is less clear than authority for speed restrictions to avoid whales, which have already been put into place in the Atlantic Whale Reporting System. A possible source of authority could be COLREGs Rule 5, which requires that every vessel maintain a proper look-out by sight, hearing, and other means at all times, so as to make a full appraisal of the situation and the risk of collision. *Navigation Rules Online: Rule 5-Lookout*, UNITED STATES COAST GUARD, http://www.navcen.uscg.gov/?pageName=navRulesContent#rule5 (last visited Feb. 15, 2014, *archived at* http://perma.cc/K3UE-E83K).

526. PSSA Guidelines, *supra* note 353, § 6.1.1 (listing as a possible associated protective measure the designation of a Special Area under MARPOL Annexes I, II, V, and VI or application of special discharge restrictions to vessels operating in a PSSA). Camden Bay (along the Beaufort Sea) is an example of a voluntary pollution avoidance zone created by the Conflict Avoidance Agreement, which requires exploratory drilling and production in a certain part of Camden Bay to prevent discharge of "drilling fluids, cuttings after 20" casing, treated sanitary and gray water, and ballast and bilge water." CAA, *supra* note 26, § 503(a).

on the area's ecological characteristics; its vulnerability due to environmental changes and increased traffic; and the navigational challenges associated with the area's ice, weather, and remoteness.[527] The importance of the area for traditional subsistence activities is another potentially qualifying factor.[528] The United States' designation of the Bering Land Bridge as a national preserve[529] and the 2012 United States-Russian Joint Statement Pursuing a Transboundary Area of Shared Beringian Heritage lend further support to the area's unique environmental characteristics.[530] The Bering Strait's status as an international strait should not prevent a PSSA designation, given that parts of another international strait, the Torres Strait, have already obtained PSSA designation.[531]

Determining which areas should be avoided or subject to protective measures requires consultation with a variety of stakeholders. The US National Marine Fisheries Service (NMFS) and its Russian counterpart should characterize the occurrence, movements, and seasonality of marine mammals and their potential vulnerability to impacts associated with vessel traffic. The US Coast Guard will need to consult with NMFS and the Fish and Wildlife Service pursuant to section 7 of the Endangered Species Act[532] to determine actions needed to protect species subject to the Act. Consultation also needs to take place with Alaska Native communities

---

527. Hartsig et al., *supra* note 1, at 38. Several international groups have already identified ecological and biological significant areas in the Bering Straits that could be designated as PSSAs. NOME WORKSHOP REPORT, *supra* note 3, at 4; *see also* NRDC, WORKSHOP TO IDENTIFY AREAS OF ECOLOGICAL AND BIOLOGICAL SIGNIFICANCE OR VULNERABILITY IN THE ARCTIC MARINE ENVIRONMENT (2010), *archived at* http://perma.cc/W5DK-WL3K (concluding that the Bering Strait meets all seven of the Convention on Biological Diversity's criteria for ecologically and biologically significant areas).

528. *See* NOME WORKSHOP REPORT, *supra* note 3, at 7 (describing subsistence use of the region); Hartsig et al., *supra* note 1, at 5.

529. The United States designated a portion of Seward Peninsula as a national preserve, the Bering Land Bridge National Preserve, in 1980. *See What is Beringia?*, NATIONAL PARK SERVICE, http://www.nps.gov/bela/historyculture/beringia.htm (last visited Nov. 17, 2013, *archived at* http://perma.cc/L9G2-S9V9).

530. The statement aims to establish a transboundary protected area linking the Bering Land Bridge National Preserve with a national park on the Russian side. *See U.S. and Russia Link Parks Across Bering Strait*, ENVIRONMENT NEWS SERVICE (Sept. 10, 2012), http://ens-newswire.com/2012/09/10/u-s-and-russia-link-parks-across-bering-strait/, *archived at* http://perma.cc/9JZ9-ENSY.

531. *See supra* Section 3.1 on the Torres Strait.

532. Section 7(a)(2) of the Endangered Species Act requires federal agencies to:

> insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical . . . .

16 U.S.C. § 1536(a)(2) (2012); 50 C.F.R. §402.14(a) (May 4, 2009) (outlining consultation procedures).

bordering the Bering Strait,[533] Alaska Native Organizations (including the Alaska Eskimo Whaling Commission), and the Alaska Department of Fish and Game to identify and characterize the species, seasons, and areas in which traditional marine mammal subsistence activities occur.[534]

An additional source of information on sensitive areas is the Bering Sea Sub Network (BSSN), which is composed of both Russian and Alaskan members.[535] BSSN has been mapping sensitive, high-density subsistence areas based on consultations with local hunters, who draw their subsistence hunting areas on a map.[536] Using this information, BSSN has compiled a map of the areas most heavily used for subsistence.[537]

5.2.7. Ice Patrol

In cooperation with Russia and other countries, the United States could establish an ice patrol similar to the one that currently takes place near Newfoundland. This would likely not happen until there is a significant increase in vessel traffic and accident risk and the US Coast Guard invests in the needed infrastructure.

5.2.8. Marine Pilotage

Alaska's compulsory marine pilotage laws could be extended to maximize the state's jurisdiction under federal law. Alaska could impose a compulsory pilot requirement extending beyond state waters if applied to vessels bound for or departing from an Alaskan port.[538]

---

533. The US Coast Guard is obligated to work on a government-to-government basis with Alaska Native Tribal governments as a part of the government's trust responsibilities. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The consultation requirement was extended to Alaska Native Corporations by a 2004 appropriations act. *See* Consolidated Appropriations Act, Pub L. 108-199, Div. H §161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, Pub L. 108-447, Div. H, Title V, §518, 118 Stat. 2809, 3267 (2005).

534. Consultation with these stakeholders should take place regardless of what system is considered for implementation.

535. Cooper, *supra* note 48, at 6.There are other non-profit and native groups working on mapping sensitive areas, including the Bering Sea Elders Group. *See Our Work*, BERING SEA ELDERS GROUP, http://www.beringseaelders.org/our-work (last visited Nov. 17, 2013, *archived at* http://perma.cc/DXM8-X2MG).

536. Cooper, *supra* note 48, at 6.

537. Cooper, *supra* note 48, at 6.

538. The federal grant of state authority over pilotage generally extends to pilotage in the "bays, rivers, harbors and ports of the United States," 46 U.S.C. §8501(a) (2013), and there is clear state authority for pilotage in connection with deep-water ports in state territorial waters. 33 U.S.C. §§1501, 1518(a)(2). A State can assert its pilotage authority and extend its compulsory pilotage waters as far from its coastline as the state reasonably believes is necessary to achieve the objectives of its compulsory pilotage system. *See, e.g.*, Gillis v. La.,

6. CONCLUSION

International and US law provide for a variety of systems that could be used separately or in tandem to regulate the Bering Strait Region. Since international law limits the United States' ability to unilaterally regulate the Bering Strait, and since wildlife is not aware of international boundaries, the United States should strive to work with Russia to obtain an IMO-approved system. Ideally, a ship reporting system along with routing measures, more navigational aids, special and protected areas, a vessel traffic service, and a tracking system could be implemented for the region. Even if agreement with Russia and IMO cannot be reached, the United States could implement a voluntary system. On a smaller scale, the implementation of a simple, VHF-based ship reporting system coordinated with the existing AEWC system would be relatively cost-effective. The designation of a PSSA could also be cost-effective and relatively simple to justify, although the effectiveness would be lower if the United States did not increase its presence in the area. As traffic increases, improving ship communications will be essential to avoid shipping accidents and marine mammal collisions and protect the resources that make the Bering Strait Region so unique.

---

294 F. 3rd 755 (5th Cir. 2002) (holding that the geographic reach of a state's pilotage jurisdiction is neither limited to three miles nor preempted by federal law); Warner v. Dunlap, 532 F.2d 767, 772 (1st Cir. 1976) (holding that States can establish and enforce their own compulsory pilotage regulations and requirements "at distances considerably greater than three miles from their shores"—as far from their coast as is necessary to "promote navigational safety and to protect the environmental integrity of their coastlines (from, e.g., oil spills caused by tankers running aground) by regulating pilotage . . . .") (alteration added); Wilson v. McNamee, 102 U.S. 572, 573-574 (1881) (recognizing a State's authority to establish pilotage requirements out to at least "fifty miles from port"); ROBERT FORCE, ADMIRALTY AND MARITIME LAW 150-151 (2004) ("Wide latitude is given to the states in determining the waters in which a vessel must procure a state-licensed pilot.") Still, there are limitations. A State cannot require pilotage of a coastwise vessel (one not entering or leaving a port) if the vessel is at least 500 tons and is a tanker, freight vessel, bulk freight vessel, high speed freight vessel, or self-propelled mobile offshore drilling unit; engaged in a foreign voyage. 46 U.S.C. §8501(d) (exclusions from state jurisdiction); 46 U.S.C. §§ 8502, 3202, 3702 (vessels subject to federal pilotage).

APPENDIX 1: COMPARISON OF SYSTEMS USED TO REGULATE SHIPS

Type of System	Ship Reporting System	Ship Routing System	Vessel Traffic Service	Long Range Tracking	Automatic Identification System
Vessels subject to system	Depends on system; may be mandatory for some or all vessels from all flag states subject to SOLAS	Depends on system; may be mandatory for some or all vessels from all flag states subject to SOLAS	Depends on system; may be mandatory for some or all vessels	Required under SOLAS and US law for cargo vessels of 300 gross tons or more, passenger ships, high speed craft, and mobile offshore drilling rigs	Required under SOLAS for all passenger vessels, all vessels of 300 gross tons and larger on international voyages, and all cargo vessels of 500 gross tons not on international voyages; required under US law for commercial vessels 65 feet or longer, passenger vessels of 150 tons or more, and all tankers, either on international voyages or in VTS areas

Vessel reporting requirements	Depends on system; should be limited to what is needed to serve purpose of system; generally includes vessel name, radio call signs, position, speed, and course; may include other information such as hazardous cargo on board	No independent requirements; may be requirements in connection with reporting system or VTS	Depends on system; generally includes same information as provided in ship reporting system; may be integrated with ship reporting system	SOLAS requires transmission of identity, position, and date and time of the position	AIS equipment required by SOLAS transmits latitude, longitude, time, course, speed, navigation status, vessel name, vessel dimensions, vessel type, destination, and estimated time of arrival
Vessel routing requirements	No independent requirements; may be requirements in connection with routing system or VTS	Depends on system; may include traffic separation schemes and traffic lanes, Precautionary Areas, Areas to be Avoided, and other areas subject to specific regulations	Depends on system; coastal VTS providing only information may not have routing requirements, while port VTSs may have requirements similar to ship routing system; may be integrated with ship routing system	No routing requirements, although vessels using AIS within 20 nautical miles of US coast are exempt from LRIT requirements	No routing requirements

Receiver information provided	Depends on system; generally navigational/ safety information provided	No independent requirements; information may be provided in connection with reporting system or VTS	Depends on system; generally includes same information as provided in ship reporting system	No independent requirements; information may be provided in connection with reporting system or VTS	No independent requirements; information may be provided in connection with reporting system or VTS
Areas in effect	Wherever system is approved by IMO, which could be in any marine area	Wherever system is approved by IMO, which could be in any marine area	SOLAS allows stand-alone mandatory VTSs only in territorial waters, but VTS could take place beyond territorial waters if voluntary or part of an IMO-approved routing/reporting system	Range is at least 1,000 nautical miles; foreign-flagged ships must report to US before entering port or when within 1,000 nautical miles of US	Standard AIS has limited horizontal range (out to 35 nautical miles); satellite-based AIS being developed with greater range; generally used in coastal areas

Approval requirements	To enforce against vessels from all SOLAS states, affected coastal states must submit joint proposal to IMO	To enforce against vessels from all SOLAS states, affected coastal states must submit joint proposal to IMO	If within territorial waters, no IMO approval needed; but state should be able to demonstrate that service is warranted by level of traffic or risk and consistent with international law; VTS could be approved by IMO in international strait in connection with ship reporting/ routing system	Already required by IMO, so state does not need IMO approval to use	Already required by IMO, so state does not need IMO approval to use

APPENDIX 2: OUTLINE OF POSSIBLE SHIP REPORTING SYSTEM FOR BERING STRAIT REGION

A mandatory reporting system for ships in the Bering Strait Region (BERING) is established.

1. Ships required to take part in the system include all of the following, except sovereign immune vessels which are exempt from reporting by SOLAS regulation V/8-1(c):

1.1. All ships of 50 meters or greater in overall length;[539]

1.2. All ships, regardless of length, carrying in bulk hazardous and/or potentially polluting cargo, including at least 10,000 gallons of fuel or other oil product, in accordance with the definitions at resolution MSC.43(64), paragraph 1.4;[540] and

1.3. All ships of 300 gross tonnage or greater.[541]

All other ships are recommended to participate in BERING.[542]

2. Geographical limits of the BERING reporting area.[543] The reporting area consists of the marine area between North America and Asia from roughly 63^{o} and 69^{o} north latitude, including the northern Bering Sea, the Bering Strait, and the southern Chukchi Sea.

3. Format and content of reports, time and geographical position for submitting reports, authority to which they must be sent, and available services.

3.1. Format. The reporting format must be consistent with IMO Resolution A.851(20).

3.2. Content. Ships are required to provide the following

---

539. *See* Torres Strait Reporting System, *supra* note 209, ¶1.

540. *See* Torres Strait Reporting System, *supra* note 209, ¶1.

541. *See* Atlantic Whale Reporting System, *supra* note 201, ¶1.

542. If BERING is integrated with the Conflict Avoidance Agreement, Paragraph 1 could be expanded to provide for three classes of reporting vessels—(1) those described in the language provided in the current Paragraphs 1.1-1.3; (2) subsistence fishing and whaling boats; and (3) all other vessels. The reporting requirements detailed in this appendix would apply only to vessels in the first category. Subsistence fishing and whaling boats would have unique reporting requirements based on the Conflict Avoidance Agreement. For example, whaling captains would be required to report to a communication center when they launch their boats from shore and again when they return shore. *See* CAA, *supra* note 26, § 202(b). They would report their whaling camp location, boat location, general direction of travel, plans for the following day, and any industry vessels not observing the agreement's guidelines. *See* CAA, *supra* note 26, § 202(b). For all other vessels, reporting would be voluntary.

543. This language covers the entire Bering Strait Region, as the term is used in this paper. The language could be modified to cover only the strait itself, or just particularly sensitive sea areas, if established. Or it could be possibly expanded to cover the entire Bering Sea, if justified by the volume of traffic. The Galapagos Islands system covers PSSAs, while the Atlantic Whale Reporting System consists of two areas frequented by whales but not established as PSSAs. Atlantic Whale Reporting System, *supra* note 201.

information: the name of the ship; call sign or IMO identification number, if applicable; position when entering the system; course; speed; route; and destination.[544] Ships must also report when they are deviating from a route or port previously reported due to weather conditions, damaged equipment, or other reasons.[545] Ships are requested to provide information on the geographic coordinates of any bowhead whales sighted, and any potentially hazardous ice or weather conditions.[546] Commercially sensitive information received in conjunction with the reporting system shall be kept confidential.[547]

3.3. Time and geographical position for submitting reports. At all times during the year,[548] participating ships are required to report to a shore-based when entering the reporting area.[549]

3.4. Authority receiving report. BERING reports must be sent to

---

544. *E.g.,* Atlantic Whale Reporting System, *supra* note 201, ¶3.2. If one of the stated purposes of BERING is to integrate with the Conflict Avoidance Agreement, it is possible that ships could also be required to report the ships' operator and owner; the oil and gas project the vessel is working on (if any); and plans for vessel movement between the time of the call and the time of the next call. *See* CAA, *supra* note 26, § 202(a) (detailing information to be reported).

545. *Cf.* Canary Islands, *supra* note 208, ¶3.3.1 (using similar language). If the Conflict Avoidance Agreement is integrated into BERING, vessels in the area for the purpose of conducting oil and gas operations could also be required to report a change in plans related to drilling or seismic operations. *See* CAA, *supra* note 26, § 202(a)(2).

546. The Atlantic Whale Reporting System makes reporting on whales voluntary: it says that "mariners will also be requested to report any whale sightings and dead, injured, or entangled marine mammals to the nearest local Coast Guard station." Atlantic Whale Reporting System, *supra* note 201, ¶4.4. It may be easier to make this aspect of reporting voluntary, given the resistance to ship routing systems for whale protection. *Cf.* SOLAS Guidelines, *supra* note 101, § 6.2.2 ("The report required should be limited to information essential to achieve the objectives of the system."). If the system is integrated with the Conflict Avoidance Agreement, ships could be required or requested to report information on whales by VHF voice call using the same radio channels listed in the Conflict Avoidance Agreement. *See* CAA, *supra* note 26, §§ 202(c), 205(a-b).

547. *See* Atlantic Whale Reporting System, *supra* note 201, ¶3.2.

548. Depending on what area is subject to the reporting system, this description could be modified. For example, if only the Bering Strait itself will be covered, reporting could be limited to the periods in spring and fall when bowhead whales are passing through the strait. Reporting could be required throughout the year if the entire Bering Sea is covered.

549. This is similar to language in the Atlantic Whale Reporting System. Atlantic Whale Reporting System, *supra* note 201, ¶3.3. Language in the Canary Island Reporting System is more complex, requiring reporting when ships deviate from route and leave from any port in the area. *Supra* note 208, ¶3.3.

549. The language here could be adjusted to require reporting to occur a certain time prior to entry, or allow reporting to take place within a certain time after entry. For example, the Torres Strait Reporting System requires reporting six hours prior to entry. Torres Strait Reporting System, *supra* note 209, ¶6. Ships could also be required to report when within five miles of certain coastal towns.

the nearest Coast Guard station.[550] Reporting may take place via Inmarsat-C, VHF-FM, or other method.[551] Information received from the ships will be sent electronically to a central location for data storage, handling, and retrieval.[552]

3.5. Language. The language used for reports in the systems is English, using the IMO Standard Marine Communication Phrases where necessary. Standard phrases in a prescribed format will be used in all direct-printing telegraphy and radiotelephony communications.

4. Information to be provided to participating ships and procedures to be observed. Mariners shall be informed that they are entering an area of critical importance for the protection of the bowhead whale or other species; that such whales or animals are present; and that ship strikes pose a serious threat to the animals and may cause damage to ships.[553]

4.1. The Coast Guard will provide ships with the following information, using the ship's broadcasting equipment: (a) information vital to weather and navigational safety in the ship's reporting area, including ice conditions, (b) geographic coordinates of recent whale sightings.

4.2. If necessary, any ship may ask for information on its own behalf about specific local conditions.

4.3. Mariners are advised to monitor Coast Guard Broadcast Notice to Mariners, NAVTEX, and NOAA Weather Radio, and to keep a continuous listening watch in the area.

5. Regulations in force in the area covered by the system. The United States has taken appropriate action to implement international conventions to which it is a party, including, where appropriate, adopting domestic legislation and promulgating regulations through domestic law. Relevant laws in force include domestic legislation and regulations to implement the International Convention on Collision Regulations, the Safety of Life at Sea

---

550. There is currently only one Coast Guard Station that is actually on the Bering Sea: the Unalaska Marine Safety Unit. *See Units Located in the 17th District*, UNITED STATES COAST GUARD, http://www.uscg.mil/d17/units.asp (last visited Nov. 17, 2013, *archived at* http://perma.cc/A4C8-LGAQ). If the Coast Guard does not want to set up new communication centers in the area, then it should consider working with the existing AEWC Communication Centers.

551. Other United States reporting systems use Inmarsat-C, although not all reporting systems use this technology and it may not be the best technology for the Bering Sea Region. The Great Belt Reporting System requires reports to be made through VHF voice transmissions, although it allows ships equipped with AIS to fulfill certain basic reporting requirements. *Supra* note 208, ¶¶3.1, 7.4.1. BERING could require voice transmissions for reports on the condition and locations of whales.

552. *See* Atlantic Whale Reporting System, *supra* note 201, ¶7.2.

553. *Cf.* Atlantic Whale Reporting System, *supra* note 201, ¶4.1 (comparing the language of the cited text to the language in the paper). If the system is integrated with the Conflict Avoidance Agreement, ships could also be informed of whaling or fishing activity in the area.

Convention, the International Convention on the Prevention of Pollution from Ships, the International Convention on Oil Pollution Preparedness, Response and Co-operation, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, the International Convention for the Regulation of Whaling, and other treaties. Relevant domestic legislation includes the Ports and Waterways Safety Act, the Endangered Species Act, the Whaling Convention Act, the Marine Mammal Protection Act, the Marine Protection Resources and Sanctuaries Act, and a variety of other acts.[554]

6. Action to take in the event of a ship's non-compliance with system requirements. All possible means will be deployed to obtain the participation of the ships required to send in reports. Should these fail to materialize and the offending ship can be identified beyond doubt, the competent authorities in the relevant flag State will be informed with a view to their investigating the situation and possibly starting legal proceedings under their national legislation. BERING exists for the exchange of information, and does not confer additional powers to impose change in a ship's operations. The reporting system will be implemented in accordance with the provisions of SOLAS Convention and other relevant international instruments.[555]

554. *See generally* Atlantic Whale Reporting System, *supra* note 201, ¶6 (showing that if any PSSA, compulsory pilotage rules, traffic separation schemes or other routing measures, actual or recommended speed limits, or Areas to be Avoided are adopted, they would be mentioned here).

555. Adding a disclaimer here such as "the reporting system will not constitute a basis for preventing the passage of a ship in transit through the reporting area" may help obtain approval of the system. As discussed in this paper, the United States would not be able to stop transit passage through an international strait.

APPENDIX 3: NAVIGATIONAL AIDS IN THE BERING STRAIT REGION

List of Coast Guard Maintained Aids to Navigation in the Bering Strait and Northward

Aid to Navigation	Structure	Operation
Cape Espenberg Light	Diamond-shaped beacon on skeleton tower	Maintained from July 1 to November 1
Kotzebue Buoys (about 8, marking the entrance to Kotzebue)	Diamond-shaped beacon on skeleton tower	Maintained from July 1 to September 20
Cape Deceit Light	Diamond-shaped beacon on skeleton tower	Maintained from July 1 to November 1
Riley Channel Entrance Light	Diamond-shaped beacon on skeleton tower	Maintained from July 1 to November 1
Cominco Red Dog Front Light	On pier	Private Aid
Cominco Red Dog Rear Light	On tower	Private Aid
Point Hope Light	Diamond-shaped beacon on skeleton tower	(no information provided)

The above list is taken from the portion of the Coast Guard's Light List that covers Nautical Chart 16005, Cape Prince of Wales to Point Barrow.[556] As shown in the figure below, Chart 16005 covers the Bering Strait itself and some areas to the north. Chart 16006 covers the area southward, some of which would also be included in the Bering Strait Region.

556. U.S. COAST GUARD, LIGHT LIST PACIFIC COAST AND PACIFIC ISLANDS VI (2012), *archived at* http://perma.cc/PCS9-LNKD.

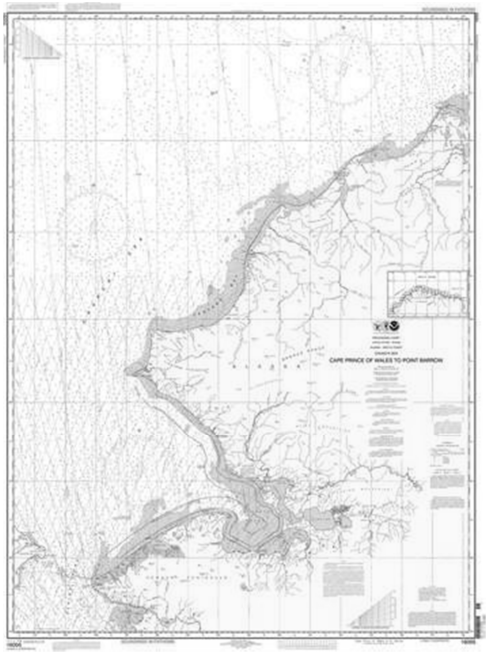
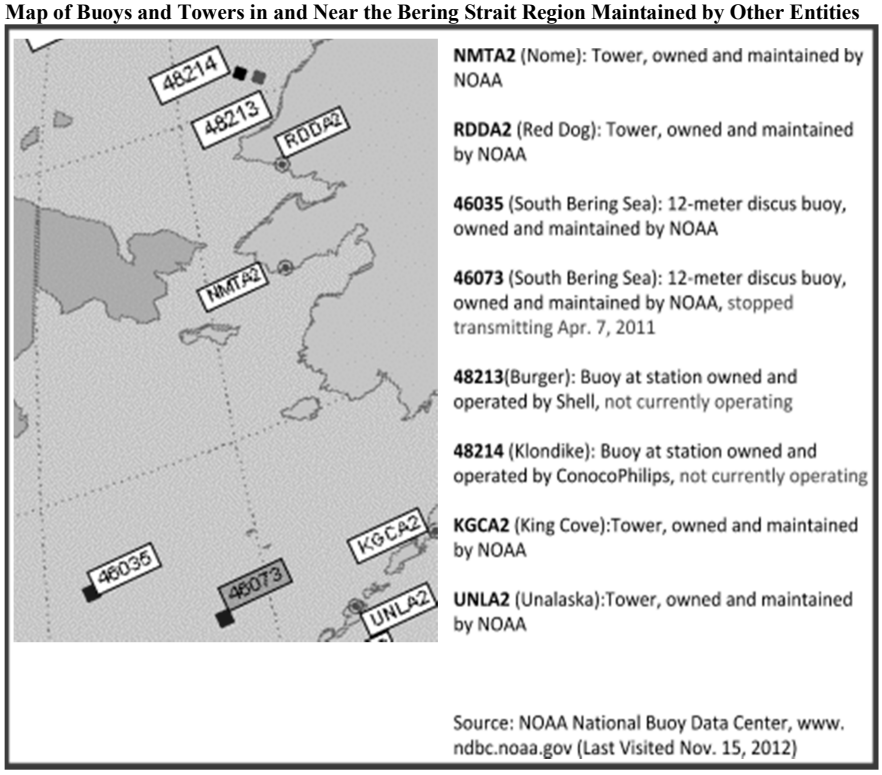


Figure: Chart 16005

Map of Buoys and Towers in and Near the Bering Strait Region Maintained by Other Entities



THE COSTS AND CONSEQUENCES OF US DRUG PROHIBITION FOR THE PEOPLES OF DEVELOPING NATIONS

J. Michael Blackwell*

ABSTRACT

The widespread production and use of illicit drugs is a social phenomenon carrying enormous social, economic, and political significance. The United States stands as a vocal and forceful proponent of prohibitionist drug controls[1] in international policymaking. However, strictly-enforced US prohibitionist drug controls largely fail to effectively reduce the consumption of narcotic drugs and ultimately create a significant number of negative consequences for many peoples throughout the world. The increased violence, government corruption, and community sequestration that result from the war against drugs are deleterious to economic development among rural communities in drug producing countries. In response to these concerns, this Article examines the purpose, effects, and consequences of the prohibitive drug controls routinely employed by the United States. Special attention is paid to an oft-overlooked repercussion of prohibitive drug controls: the marginalization of developmental human rights for peoples in drug producing countries.

---

* J.D., Indiana University Robert H. McKinney School of Law, 2013. A special thanks to family, friends, and Dr. Frank Emmert for guidance and support.

1. Jeffrey A. Miron, *The Economics of Drug Prohibition and Drug Legalization*, 68 SOC. RES. 2 (2001) [hereinafter *The Economics of Drug Prohibition*].

I. INTRODUCTION

The debate surrounding drug control policy in the United States is one of the most highly contested issues of recent decades.[2] Narcotic drugs have long maintained a strong global presence and a significant impact on the lives of many peoples throughout the world. In response, a majority of nations embrace drug control policies that strictly prohibit the use and trade of narcotic drugs.[3] The United States in particular stands as a vocal and forceful proponent of prohibitionist drug controls in international policymaking.[4] Over the last forty years, the United States spent more than $2.5 trillion on a number of activities, both domestic and abroad, aimed at decreasing the international flow of illicit drugs.[5]

Despite these efforts, empirical evidence indicates that these prohibitionist drug control policies fail to effectively reduce the consumption or production of drugs. Research suggests the worldwide number of drug users expanded throughout the past decade despite pervasive use of prohibitionist measures.[6] The United Nations Office on Drugs and Crime (UNODC) estimates that, in 2010, between 153 million and 300 million people used illicit narcotics worldwide.[7] In 2009, an estimated 8.7 percent of the US adult population (approximately 21.8 million people) used illicit drugs.[8]

This Article will show that the global implementation of strict prohibitionist drug control policies arguably yields many negative consequences for many peoples around the world, including increased

---

2. *Id.*

3. Philip Keefer et al., *The Development Impact of the Illegality of Drug Trade* 2 (The World Bank Policy Research Working Paper 4543, 2008), *archived at* http://perma.cc/65DG-9V89.

4. Melanie R. Hallums, *Bolivia and Coca: Law, Policy, and Drug Control*, 30 VAND. J. TRANSNAT'L L. 817, 843 (1997).

5. Brian Gilmore, *Again and Again We Suffer: The Poor and the Endurance of the "War on Drugs,"* 15 UDC/DCSL L. REV. 59, 68 (2011).

6. Daniel Heilmann, *The International Control of Illegal Drugs and the U.N. Treaty Regime: Preventing or Causing Human Rights Violations?*, 19 CARDOZO J. INT'L & COMP. L. 237, 261, 265 (2011).

7. U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2012 7 (2012), *archived at* http://perma.cc/TS9G-GA24 [hereinafter WORLD DRUG REPORT 2012]. Since the 1990s, drug consumption of almost all types of illicit drugs has been on the rise. Joe Swanson, *Drug Trafficking in the Americas: Reforming United States Trade Policy*, 38 GEO. WASH. INT'L L. REV. 779, 781 (2006). Drug consumption has increased or remained steady in all categories of illicit drugs other than cocaine. *Id*.

8. *See* Press Release, Substance Abuse & Mental Health Servs. Admin., National Survey Shows a Rise in Illicit Drug Use from 2008 to 2010 (Sept. 8, 2011) [hereinafter SAMHSA Press Release], *archived at* http://perma.cc/Q2DT-HFXZ; U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2011 13 (2011), *archived at* http://perma.cc/UKC3-HRGT.

violence among drug market participants, pervasive corruption of government agents, and crippling impairment of economic development among the world's underprivileged populations. This Article will also show that in the drug producing countries, prohibitionist policies encourage the destruction of private property and expropriate the wealth of poor farmers engaged in drug crop cultivation. Public safety and security are undermined, leaving entire nations weakened by the plague of corruption and violence that accompanies illicit drug activity.

While the modern drug control system may reduce potential harms associated with drug use,[9] a strict prohibitive drug control system certainly creates additional costs and consequences for many peoples. Assessing the balance of these costs and any benefits is essential to affecting appropriate drug control measures and minimizing the negative impacts of drugs in society. This Article stresses the need for policymakers to comprehensively consider all costs and benefits of drug controls, as well as the costs and benefits of drug use itself.

Undeniably, the prevalence of drugs creates a number of individual and social costs for many peoples and societies: to some degree, regulation in the narcotic drug market is clearly necessary. Accordingly, this Article does not call for sweeping deregulation of the narcotic drug market. However, the imposition of a strict prohibitionist control system itself creates a great number of social costs.[10] These costs must be equally and adequately considered if the current drug scheme is to be meaningfully improved.

This Article examines the purpose and effects of the prohibitive drug controls employed by the United States and the costs and consequences that result. Although this Article does not present a comprehensive account of all topics relevant to the prohibition conversation, it calls attention to a number of particularly important facts and perspectives that that are generally under-represented in drug control policymaking. Part II of this Article discusses the broad effects of drug consumption on society, the purposes of government drug controls, and an overview of prohibitionist drug control measures as they are implemented in international and US law. Part III applies a cost-benefit analysis to addresses the myriad problems stemming both from drug use and government-imposed drug controls. Special attention is called to an oft-overlooked consequence of the prohibitive drug model: the marginalization of developmental human rights for many peoples in drug producing countries. Finally, Part IV emphasizes the urgent need for the revision of US drug controls and offers a practical suggestion for reducing the harms currently stemming from prohibitionist activities.

---

9. *The Economics of Drug Prohibition*, *supra* note 1, at 5.
10. *The Economics of Drug Prohibition*, *supra* note 1, at 5.

II. THE FUNDAMENTAL DRUG PROBLEM

The production and use of illicit drugs is a problem with enormous social, economic, and political significance. The UNODC estimates that, in 2010, between 153 million and 300 million people worldwide consumed illicit narcotics.[11] The network of illegal drug trafficking that supplies these consumers is valued at more than $320 billion annually and accounts for nearly 10 percent of all global trade.[12] While cannabis, opiates, and cocaine are commonly identified as the main problem drugs,[13] consumption of new synthetic drugs (e.g. ecstasy and methamphetamine) is steadily increasing.[14] Although fluctuations in consumption patterns vary by geographic region, research suggests that the overall number of drug users has expanded worldwide throughout the last decade.[15]

North America is recognized as the world's largest consumer drug market, accounting for 44 percent of total global drug sales.[16] According to the UNODC, approximately 1.1 percent of North American GDP in 2003, or $331 per capita, is borne directly from the illicit drug trade.[17] Drug-related activity in the United States is particularly robust. In 2009, an estimated 8.7 percent of the US adult population used illicit drugs.[18] In the United States, cannabis is by far the most commonly consumed narcotic.[19] In 2008, 15.2 million people age twelve or older had used cannabis within the previous month.[20] Cocaine, the second most commonly consumed illicit

---

11. WORLD DRUG REPORT 2012, *supra* note 7, at 7. Since the 1990s, drug consumption of almost all types of illicit drugs has been on the rise. Swanson, *supra* note 7, at 781. Drug consumption has increased or remained steady in all categories of illicit drugs other than cocaine. *Id*.

12. U.N. OFFICE ON DRUGS AND CRIME, WORLD DRUG REPORT 2005 127 (2005), *archived at* http://perma.cc/49YE-A3BG [hereinafter WORLD DRUG REPORT 2005]. Note that "[d]ue to the fact that in many instances the cultivation and production of drugs takes place in remote places and concealed settings, it is extremely hard to estimate the quantities of drugs produced." Heilmann, *supra* note 6, at 259. However, estimates are possible, and are provided by the UNODC. Heilmann, *supra* note 6, at 259.

13. Swanson, *supra* note 7, at 782.

14. Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 97 (1999).

15. Heilmann, *supra* note 6, at 261. Heroin and opium use is reported to be increasing in the developing countries of Eastern Europe, Africa, and Asia. Heilmann, *supra* note 6, at 261. Also, while recent years have shown a decline in US cocaine consumption, the European market for cocaine is experiencing "a substantial expansion." Heilmann, *supra* note 6, at 261.

16. WORLD DRUG REPORT 2005, *supra* note 12, at 128.

17. WORLD DRUG REPORT 2005, *supra* note 12, at 129.

18. SAMHSA Press Release, *supra* note 8.

19. SIDNEY WEINTRAUB & DUNCAN WOOD, COOPERATIVE MEXICAN-U.S. ANTINARCOTICS EFFORTS 6 (2010), *archived at* http://perma.cc/8AA-7SRH.

20. *Id.*

drug, was used by only 1.9 million individuals during the same period.[21]

The supply of narcotics is made available primarily through an international supply chain composed of transnational criminal organizations. While cannabis and amphetamine production occurs in over 170 countries,[22] coca and opium crop cultivation is concentrated in only a small handful of countries, including Afghanistan, Colombia, Peru, and Bolivia.[23] Significant drug transit pathways exist throughout much of Central America, West Africa, and the countries bordering Afghanistan. "Traffickers employ a wide range of land, air, and maritime methods for transporting illicit narcotics" including speed boats, shipping containers, submarines, small aircraft, commercial airlines, global mail delivery services, and ground transportation.[24]

Drug use is often cited as a flagrant social ill that spoils communities, hinders economic development, elevates crime rates, and burdens national public health infrastructures.[25] Observers also suggest that "drug trafficking . . . represents a systemic threat to international security."[26] In response to these costs, the majority of the world's governments prohibit the production and consumption of narcotic substances.[27] In theory, these prohibitionist controls serve as non-monetary "taxes" that increase suppliers' costs, decrease the supply of drugs, and ultimately reduce the quantity of drugs consumed.[28] The success of these measures largely depends on the relative

---

21. *Id.*

22. PETER REUTER & FRANZ TRAUTMANN, A REPORT ON GLOBAL DRUG MARKETS 1998-2007 11 (2009).

23. EUR. COMM'N DIRECTORATE-GENERAL OF JUSTICE, FREEDOM AND SECURITY, A REPORT ON GLOBAL ILLICIT DRUG MARKETS 1998-2007 11 (2009), *archived at* http://perma.cc/3WCG-68M7; Heilmann, *supra* note 6, at 260.

24. LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34543, INTERNATIONAL DRUG CONTROL POLICY: BACKGROUND AND U.S. RESPONSES 6 (2013), *archived at* http://perma.cc/87BF-QWCA; *see* David Kushner, *The Latest Way to Get Cocaine Out of Colombia? Under Water*, N.Y. TIMES MAGAZINE, Apr. 26, 2009, at MM30, *archived at* http://perma.cc/VG8E-UKS8 (discussing the use of submarines in drug trafficking activities).

25. WYLER, *supra* note 24, at 6.

26. WYLER, *supra* note 24, at 6.

27. Swanson, *supra* note 7, at 780. In an ideal world, drug control policy would "account for the fact that externalities created by drug use vary widely across individuals and drug type." Keefer et al., *supra* note 3, at 13. However, achieving such an ideal model is inherently difficult. In many societies, large segments of the population flatly reject the use of narcotic drugs, creating a social contempt that limits the creation of an ideal drug control policy. Philip Keefer et al., *supra* note 3, at 13. "Many States and international organizations, including both the United Nations and the United States, embrace a drug control regime that [highly estimates the negative externalities associated with drug use]." Keefer et al., *supra* note 3, at 13. Under such control systems, the production, trade, and use of narcotic drugs, are staunchly prohibited.

28. JEFFREY A. MIRON, A CRITIQUE OF ESTIMATES OF THE ECONOMIC COSTS OF DRUG ABUSE 17-18 (2003), *archived at* http://perma.cc/EEQ4-KWF6 [hereinafter MIRON

price elasticity of the demand and supply of illicit drugs.[29] Many factors affect the purchase preferences of drug consumers, including the severity of legal penalties, uncertainty about product quality, danger associated with illicit transactions, and the individual consumer's respect for the law.[30] Similarly, the elasticity of drug supply is determined by such factors as the number of suppliers, availability of resources, and the costs of production relative to output.[31]

Substantial social science literature is dedicated to analyzing these factors, their effects on consumer behavior, and the imposition of prohibitive drug controls on the overall drug market.[32] Although no definitive conclusion has yet been achieved, researchers largely indicate that drug prohibition has little or no effect on overall consumption of illicit drugs.[33] But regardless of the quantity reduction that results, it is clear that the imposition of prohibitionist controls creates a black market for narcotic drugs. Many negative externalities result including corruption, extortion, and violence, seriously threatening the social, political, and economic stability of many nations and peoples.[34]

A. Drug Prohibition Efforts within International Organizations

Prohibitionist drug controls in international law are promulgated primarily through a series of United Nations conventions that set out a comprehensive strategy for controlling the narcotics trade. Three fundamental documents establish this framework: The Single Convention on Narcotic Drugs as amended by the 1972 Protocol, the Convention on Psychotropic Substances, and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[35] Although these

---

CRITIQUE]. Drug prohibition creates trade barriers and criminal sanctions that dramatically increase the cost of doing business in the drug market. *Id*. Additional business expenses are also created, including bribery costs and the need to compensate employees for the risk of injury and incarceration. *Id.*; *see also* Gary S. Becker et al., *The Economic Theory of Illegal Goods: The Case of Drugs* 6 (National Bureau of Economic Research, Working Paper No. 10976, 2004). The case is similar with other underground economies including prostitution, the sale of goods to minors, and gambling, the illicit drug trade. *Id*. at 1. Supply restrictions generate scarcity, and boost the price to consumers. Heilmann, *supra* note 6, at 262; *see also* MIRON CRITIQUE, *supra* at 17.

29. *Factors affecting Price Elasticity of Supply,* DINESHBAKSHI.COM, http://www.dineshbakshi.com/ib-economics/microeconomics/161-revision-notes/1709-factors-affecting-price-elasticity-of-supply (last visited Dec. 31, 2012, *archived at* http://perma.cc/C8JY-4J7W).

30. Jeffrey A. Miron & Jeffrey Zwiebel, *The Economic Case Against Drug Prohibition*, 9 J. OF ECON.PERSPECTIVES 175, 176 (1995).

31. *Factors affecting Price Elasticity of Supply, supra* note 29.

32. *See* the literature of Jeffrey Miron and progeny.

33. *The Economics of Drug Prohibition*, *supra* note 1, at 835, 839.

34. WYLER, *supra* note 24, at 6.

35. Heilmann, *supra* note 6, at 239-240. The UN drug control system is managed by

U.N. conventions "are part of a large body of international law that is not 'enforceable' in the traditional sense," their ratification obligates States to bring their domestic laws in line with treaty obligations.[36] Signatories are subjected to diplomatic pressure, most notably from the United States, to refrain from enacting domestic laws in conflict with prohibitionist policies.[37]

The U.N.-guided international drug control system is inherently interdependent with unilateral State efforts and numerous bilateral initiatives aimed at controlling the drug market.[38] For instance, bilateral agreements between the United States and drug producing countries encourage "intelligence sharing, joint investigations, and the establishment of permanent task forces."[39] Such initiatives include: the Mérida Initiative in Mexico; Central American Citizen Security Partnership; Caribbean Basin Security Initiative; US-Colombia Strategic Development Initiative; US Counternarcotics Strategy for Afghanistan; and West Africa Cooperative Security Initiative.[40]

Despite the threat of international diplomatic reprimand from prohibitionist countries, many nations embrace drug control policies that are less restrictive than the prohibitionist model. For example, personal drug consumption in the Netherlands, Switzerland, Italy, Spain, and Portugal is largely decriminalized. These nations refrain from embracing a prohibitionist system, and instead focus drug control efforts on reducing the harms that result from drug use. These harm reduction drug control efforts acknowledge drug use as an unstoppable "part of the human world, for better or worse" and render services for assisting drug users in reducing the harms of drug use itself.[41] British Columbia also embraces a harm reduction drug control system by offering clinical programs such as safe injection sites, needle exchanges, and community health services to reduce the spread of deadly diseases like Hepatitis C and HIV/AIDS.[42]

In contrast to these harm reduction initiatives, a majority of nations embrace a prohibitionist drug control model. In many parts of the world, this strict prohibitionist regime provides a platform for egregious exploitation, oppression, and violence against citizens by criminal organizations and governments alike. In Mexico, for example, the war over drugs is a serious national problem that threatens the social and economic

---

three UN bodies: The Commission on Narcotic Drugs, the International Narcotics Control Board, and the UN Office on Drugs and Crime.

36. KINGS COUNTY BAR ASSOCIATION, EFFECTIVE DRUG CONTROL: TOWARD A NEW LEGAL FRAMEWORK n.203 (2005), *archived at* http://perma.cc/34YV-JW93 [hereinafter KINGS COUNTY BAR].

37. *Id*.

38. Heilmann, *supra* note 6, at 257.

39. Heilmann, *supra* note 6, at 258.

40. WYLER, *supra* note 24, at "Summary."

41. KINGS COUNTY BAR, *supra* note 36, at n.260.

42. KINGS COUNTY BAR, *supra* note 36, at n.265.

stability of the nation. Increased competition among Mexican cartels has increased drug trafficking wildly along Mexico's Northern border, turning drug-related crime into a rampant problem.[43] As alliances shift between gangs of cartel operatives, innocent civilians are caught in the crossfire between cartel gunmen and law enforcement officials. These conflicts have contributed to the doubling of the Mexican crime rate since the early 1990s, including increased kidnappings, bribery of government officials, and drug-related violence.[44]

Mexican law enforcement activities have in many ways exacerbated the issues surrounding narcotic drugs and produced a significant number of human rights violations. Oftentimes, corrupt law enforcement officials deliberately fail to enforce laws against narcotics traffickers.[45] Also, some uncorrupt but overzealous police officers ignore the human rights of individuals suspected of drug-related crimes. Many times, local Mexican police officers and the judiciary work under the employ of the drug cartel and ultimately ensure the continued presence of narcotics trade in Mexico.[46]

Drug control problems also persist in East Asia, where strict drug enforcement laws often allow for the extrajudicial killing of drug market participants. Hundreds of people are executed annually for violating drug laws in many nations including Vietnam, Singapore, Malaysia, China, Iran, and Saudi Arabia. In the Philippines, "death squads" routinely kill persons suspected by the Philippine Drug Enforcement Agency of drug-related activity.[47] In Singapore, the Misuse of Drugs Act provides a mandatory death sentence for trafficking small quantities of narcotics, and is cited by the Singapore Court of Appeal as justification for the execution of a nineteen-year-old man convicted of peddling forty-two grams of diamorphine.[48] The Chinese government publicly executed more than fifty people in a single week to support the United Nation's "Anti-Drugs Day."[49]

---

43. Jeremiah E. Goulka, *A New Strategy For Human Rights Protection: Learning From Narcotics Trafficking In Mexico*, 9 CARDOZO J. INT'L & COMP. L. 231, 234 (2001).

44. *Id.* at 235. Estimates suggest that upwards of 500 kidnappings occur in Mexico every year. *Id.* Mexican traffickers spend "more than sixty percent of their $10 billion annual revenue paying bribes." *Id*. at 236. Since 2006, more than 60,000 people have been killed in drug-related violence in the border city of Ciudad Juárez alone. *Q&A: Mexico's Drug-Related Violence*, BBC NEWS (Dec. 24, 2012), http://www.bbc.co.uk/news/world-latin-america-10681249, *archived at* http://perma.cc/MZG2-F4PJ.

45. Ted Galen Carpenter, *Corruption, Drug Cartels and the Mexican Police*, CATO INSTITUTE (Sept. 4, 2012), http://www.cato.org/publications/commentary/corruption-drug-cartels-mexican-police, *archived at* http://perma.cc/CC4D-PGJZ.

46. Goulka, *supra* note 43, at 238.

47. KINGS COUNTY BAR, *supra* note 36, at n.238.

48. Misuse of Drugs Act, Cap. 185, (2008) (Singapore), *archived at* http://perma.cc/9XLZ-FADP; *see also* KINGS COUNTY BAR, *supra* note 36, at nn.239-240.

49. KINGS COUNTY BAR, *supra* note 36, at n.243.

B. United States Prohibitionist Drug Control Regime

The United States stands as the most vocal and forceful proponent of prohibitionist drug controls in international policymaking.[50] Over the last forty years, the United States spent over $2.5 trillion on prohibitive drug control activities.[51] The United States maintains the highest incarceration rate in the world, a statistic due in no small part to the aggressive implementation of prohibitionist policies.[52]

1. Domestic drug Enforcement Efforts

Modern drug control efforts in the United States began in the late nineteenth century with the prohibition of domestic manufacture or import of opium products.[53] Subsequent changes in the social and political climate of the early twentieth century allowed Congress to expand its police powers and establish a foundation for drug prohibition that extends to present day. Throughout the twentieth century, US lawmakers continued to expand the prohibitionist drug control system, enacting additional drug laws to prohibit drug-related activity, including both the manufacture and recreational use of drugs.[54] US anti-drug efforts like the "Reefer Madness" campaign of the 1930s aimed to demonize cannabis, promote biases against racial minorities, and snub out the cannabis industry.[55] A number of federal drug control laws were enacted to snub out drug consumption, including the Boggs Act of 1951,[56] Narcotic Control Act of 1956,[57] and the Drug Abuse Control Act of 1965.[58]

---

50. Hallums, *supra* note 4, at 843.

51. Gilmore, *supra* note 5, at 68.

52. Gilmore, *supra* note 5, at 73.

53. KINGS COUNTY BAR, *supra* note 36, at nn.88-90.

54. KINGS COUNTY BAR, *supra* note 36, at n.110. The Harrison Act required all manufactures of narcotics to register their activity with the federal government and pay a tax on all transactions, limiting the availability of opium and cocaine for non-medical recreational purposes. KINGS COUNTY BAR, *supra* note 36, at n.117. Opium Exclusion Act was the first federal drug law serving as a message of US intolerance toward recreational drug use. KINGS COUNTY BAR, *supra* note 36, at n.111.

55. KINGS COUNTY BAR, *supra* note 36, at n.148.

56. KINGS COUNTY BAR, *supra* note 36, at n.148.

57. KINGS COUNTY BAR, *supra* note 36, at n.164.

58. The Boggs Act imposed the nation's first mandatory minimum sentences for drug-related convictions. KINGS COUNTY BAR, *supra* note 36, n.161. The Narcotic Control Act of 1956 (Daniel Act) increased prison terms and fines for violations of narcotics laws. KINGS COUNTY BAR, *supra* note 36, at n.165. The Daniel Act also added a death penalty provision for selling heroine to persons under the age of 18. KINGS COUNTY BAR, *supra* note 36, at n.165. The Drug Abuse Control Act of 1965 established the Bureau of Drug Abuse Control, charging the Food and Drug Administration with enforcement responsibility, but was largely unsuccessful in decreasing drug use. KINGS COUNTY BAR, *supra* note 36, at n.170.

In the early 1970s, President Nixon took drug prohibition efforts to new heights. In 1969, the Nixon administration embarked on a global campaign against drug trafficking by launching a series of anti-drug policy actions colloquially known as the "War on Drugs."[59] These public campaign efforts served as an effective accompaniment to the Controlled Substances Act (CSA), enacted by the United States Congress in 1970.[60] The CSA replaced all previously existing federal drug laws and marked the beginning of the modern drug control era.[61] To this day, the CSA is the primary piece of federal legislation directing drug enforcement activities in the United States, including crop eradication, border inspections, drug screenings in prison, and control of precursor chemicals.[62] In the decades since, US policymakers largely supported a strict approach to drug control, issuing a series of anti-drug laws to update the CSA.[63] As a result, current drug laws embrace a schedule of strict punishment for drug offenses, including mandatory minimum sentences and the availability of the death penalty for certain drug-related crimes.[64]

Despite these strict federal drug laws, wide variation still exists among the specific drug policies embraced in each state. The federal legal framework for drug prohibition provides discretion to state and local governments to employ different methods for controlling drug distribution and use.[65] While a majority of states historically embraced the prohibitionist model of drug control, a growing number of states have recently adopted alternative drug control schemes.[66] To date, twenty-three states and the District of Colombia have enacted laws to legalize the medical use of cannabis.[67] In most recent developments, the states of Colorado and

---

59. KINGS COUNTY BAR, *supra* note 36, at n.174. The Nixon administration's anti-drug activities included increased border searching on the Mexican border, the creation of the National Commission on Marijuana and Drug Abuse in 1971. KINGS COUNTY BAR, *supra* note 36, at n.174.

60. 21 U.S.C. § 801 (2013).

61. KINGS COUNTY BAR, *supra* note 316, at n.175.

62. OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY, ch. IV, pt. 7 (1999), *archived at* http://perma.cc/9VJR-S66N.

63. *Controlled Substances Act Summary*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Controlled%20Substances%20Act (last visited Aug. 30, 2014, *archived at* http://perma.cc/94R8-VBY8).

64. 21 U.S.C. § 801 (2013).

65. KINGS COUNTY BAR, *supra* note 36, at 70.

66. Federal law establishes a blanket prohibition of narcotics listed on the CSA schedules. By creating local laws to legalize some of these substances, a conflict is created over federal power and states' rights. KINGS COUNTY BAR, *supra* note 36, at 93. This conflict implicates the Commerce and Supremacy Clauses of the United States Constitution. *Id*. For an in-depth discussion of this conflict, *see* KINGS COUNTY BAR, *supra* note 36, at 178-187.

67. *23 Legal Medical Marijuana States and DC*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated July 31, 2014, *archived at* http://perma.cc/9KX7-TXYN).

Washington passed initiatives legalizing the personal use, possession, and production of cannabis. Whether these divergent state laws will be upheld under the federal drug control statutes and the United States Constitution remains an open question.

2. US Foreign Policy and International Drug Control Activity

The United States also engages in a number of international activities aimed at decreasing the international flow of illicit drugs, including "eradicating crops and production activities, combating drugs in transit, dismantling international illicit drug networks, and creating incentives for foreign government cooperation on U.S. drug control initiatives."[68] The United States engages in numerous bilateral agreements with drug producing countries to support training and equipping military personnel with attack helicopters, weapons, and other equipment to be used in the fight against drug trafficking.[69] Significant federal resources are appropriated for these ends. For instance, between 2000 and 2005 the United States Congress allocated $4.3 billion to fight the drug trade in the Andean region.[70] In 2008, the United States provided $400 million in foreign-assistance packages to the Mexican government to combat drug trafficking in Mexico.[71]

The United States employs a number of specific strategies in its international fight against drugs. "Aid leveraging" tactics are used as a tool for stimulating and maintaining drug enforcement programming in foreign nations.[72] In 1986, Congress passed amendments to the Foreign Assistance Act for the suspension of economic aid to countries not cooperating with US prohibition efforts.[73] The Anti-Drug Abuse Act created a certification system allowing the United States to "use foreign economic aid to pressure foreign governments to establish domestic drug control measures."[74] Also, the president may act under the US Foreign Relations Authorization Act to waive financial aid commitments for any country designated as having "failed demonstrably" to make substantial efforts to adhere to international counter-narcotics agreements.[75] In addition, US representatives to

68. WYLER, *supra* note 24, at "Summary."

69. Marshall B. Lloyd, *Conflict, Intervention, and Drug Trafficking: Unintended Consequences of United States Policy in Colombia*, 36 OKLA. CITY U. L. REV. 293 (2011).

70. CONNE VEILLETTE & CAROLINA NAVARRETE-FRÍAS, CONG. RESEARCH SERV., RL 33163, DRUG CROP ERADICATION AND ALTERNATIVE DEVELOPMENT IN THE ANDES 1 (2005), *archived at* http://perma.cc/PP5Z-M6X7.

71. Lloyd, *supra* note 69, at 314.

72. Sandi R. Murphy, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1266 (1990).

73. Hallums, *supra* note 4, at 843.

74. Hallums, *supra* note 4, at 843-844.

75. UNITED STATES DEP'T OF STATE BUREAU FOR INT'L NARCOTICS AND LAW

multilateral development banks (*e.g.*, the World Bank and Inter-American Development Bank Group) vote against multilateral loans for any country not receiving certification from the president.[76] Free trade agreements such as the US-Andean Trade Promotion and Drug Eradication Act are also used to encourage anti-drug programming in drug producing countries.[77]

Aid leveraging facilitates US-sponsored crop eradication programs that aim to attack the drug supply at its agricultural foundation. For example, Bolivia, a drug-producing country dependent on foreign aid for its agricultural and economic development, found cooperation with US drug enforcement efforts to be a political and economic necessity. Since the 1970s, the United States has encouraged Bolivian coca controls through the promulgation of several bilateral agreements and financial assistance packages.[78] In 1983 Bolivia agreed to meet drug eradication targets in consideration for a foreign aid offer made by the US government.[79] The United States cancelled this package when Bolivia failed to meet those eradication targets.[80] In an effort to regain economic assistance, Bolivia ultimately cooperated with US military operations to destroy cocaine laboratories, and agreed to a total ban on coca production in Bolivia.[81]

US crop eradication methods vary by region and crop species. Aerial fumigation campaigns are used to reduce coca cultivation in Colombia, and involve the dispersion of harmful chemical herbicides from low-flying aircraft.[82] Since 2000, the United States has spent over $500 million fumigating more than one million hectares of Colombian territory.[83] Such missions are conducted by US contractors, hired by the US Office of Interregional Aviation Support, and the Colombian National Police.[84] Manual eradication techniques are also employed in some regions, involving teams of eradicators to pull coca bushes from the ground.[85] Such

---

ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 2 (2012), *archived at* http://perma.cc/D3TW-SKW4.

76. Murphy, *supra* note 72, at 1266.

77. Ashley Day Drummond, *Peru: Coca, Cocaine, and the International Regime Against Drugs*, 14 L. & BUS. REV. AM. 107, 127 (2008).

78. Hallums, *supra* note 73, at 827.

79. Murphy, *supra* note 72, at 1276.

80. Murphy, *supra* note 72, at 1276.

81. Murphy, *supra* note 72, at 1276.

82. VEILLETTE & NAVARRETE-FRIAS, *supra* note 70, at 4. A report by the Inter-American Drug Abuse Control Commission concluded that glyphosate poses a "significant risk to human health." INTER-AMERICAN DRUG ABUSE CONTROL COMMISSION, ENVIRONMENTAL AND HUMAN HEALTH ASSESSMENT OF THE AERIAL SPRAY PROGRAM FOR COCA AND POPPY CONTROL IN COLOMBIA 121 (2005), *archived at* http://perma.cc/6HMR-83J5.

83. *See* HUMAN RIGHTS WATCH, OPEN SOCIETY INSTITUTE, INT'L HARM REDUCTION ASS'N,, HUMAN RIGHTS AND DRUG POLICY: BRIEFINGS FOR THE UN COMMISSION ON NARCOTIC DRUGS 24 (2010) [hereinafter HUMAN RIGHTS AND DRUG POLICY], *archived at* http://perma.cc/5XK9-3KHD.

84. VEILLETTE & NAVARRETE-FRÍAS, *supra* note 70, at 4.

85. Eradicators are often accompanied by police or military personnel. HUMAN RIGHTS

techniques are routinely employed for coca eradication in a number of Andean nations and also in Afghanistan for the destruction of poppy crops.[86] In an effort to mitigate the negative effects of crop eradication, the United States often promotes alternative crop substitution programming to replace illicit crops with legal alternatives.[87] In practice, however, alternative crop programs fail to effectively reduce crop production and ultimately leave farmers without viable alternatives to drug production.[88] In some cases, eradication and substitution programs even lead to increased cultivation of drug producing crops in other locations.[89] For example, eradication strikes in the Golden Triangle were shown to cause large increases in opium production in Afghanistan.[90] As one Colombian farmer noted, "[u]ntil there is investment to change the foundation of our economy, people will continue to plant and replant coca, cutting down forests and doing what it takes to grow the only product that is easy to bring to market, always has a buyer, and generates an income to provide for a family."[91]

Despite these crop eradication efforts, evidence indicates that aid leveraging and crop eradication initiatives fail to effectively decrease the production and trafficking of narcotic substances. Prohibitionist drug control programs simply provide an effective opportunity for the United States to perpetually exploit the economic positions of developing countries and incentivize impoverished peoples to become ever more invested in the risky yet highly profitable illicit drug trade.

III. ANALYSIS

While the modern drug control system may reduce the impact of some harms associated with narcotic drugs, it is arguable that prohibitive drug controls create additional costs and consequences for many peoples. Assessing the balance of these costs and benefits is essential to affecting appropriate drug control measures and minimizing the negative impacts of drugs in society. Unfortunately, the analyses routinely employed by drug control policymakers incorporate biased information and illogical reasoning founded predominantly on inaccurate data and subjective moral opinions.[92] Oftentimes, the real and practical effects of drug controls are not wholly and equally considered. Indeed, "government agencies have sometimes

---

AND DRUG POLICY, *supra* note 83, at 23.

86. HUMAN RIGHTS AND DRUG POLICY, *supra* note 83, at 23.

87. Swanson, *supra* note 7, at 793-794.

88. *See* HUMAN RIGHTS AND DRUG POLICY, *supra* note 83, at 23.

89. Swanson, *supra* note 7, at 795.

90. Heilmann, *supra* note 6, at 268.

91. HUMAN RIGHTS AND DRUG POLICY, *supra* note 83.

92. *See generally* Eric Blumenson & Evan Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43 (2009) (concluding that US drug policies fail to meet its primary objectives: to respect citizen's rights, target real risks or harms, and be successful in reducing those risks and harms).

used drug research to support policy rather than to shape it."[93]

In order to promote efficiency and effectiveness in a given drug control regime, policymakers must accurately consider and compare all costs and benefits of the drug control system as well as the costs and benefits of drug use itself. Specifically, policymakers must comprehensively account for all positive and negative externalities associated with the production, consumption, and regulation of drugs. As economist Jeffrey Miron has suggested, determining the proper drug control system depends on (1) what level of reduction in drug consumption is *actually* beneficial to society, and (2) whether the prohibition policy itself is an effective method of achieving those reductions.[94]

A. The Costs and Benefits of Drug Consumption

It cannot be denied that people often derive a substantial short-term benefit from consuming narcotic substances, despite their high prices and the threat of severe penalties.[95] Accordingly, a comprehensive analysis of the drug problem must appropriately account for this benefit when balancing the costs and benefits of drugs in society. Of course it could be argued that some drug users by their very nature underestimate the costs and consequences of addictive drug use. However, substantial evidence indicates that the negative consequences of narcotic drug use are often overstated: "the degree to which illegal drugs are physically detrimental is far less than generally portrayed, provided they are consumed under safe circumstances."[96] Research also shows that many illicit drugs are "far less addictive than commonly portrayed," and that drug use does not necessarily result in decreased levels of personal health or productivity.[97] In fact, several studies indicate that most regular drug users are capable of functioning normally as productive members of society and that their greatest drug-related problem is simply obtaining a steady supply.[98]

---

93. NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, DRUG USE IN AMERICA: PROBLEM IN PERSPECTIVE 279, 368-70 (1973); The Commission on Marijuana and Drug Abuse, informally known as the "Shafer Commission" was created by the Nixon Administration. Despite these findings presented by the Commission, President Nixon disowned the Commission's report because it "would send the wrong message." Blumenson & Nilsen, *supra* note 92, at 55-56.

94. Miron & Zwiebel, *supra* note 30, at 181.

95. Miron & Zwiebel, *supra* note 30, at 182.

96. Miron & Zwiebel, *supra* note 30, at 182.

97. "Few persons who try drugs or regularly use drugs become dependent." A. Thomas McLellan et al., *Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation*, 284 J. AM. MED. ASS'N 1689, 1693 (2000), *archived at* http://perma.cc/8M3D-7LDS; *see generally* Miron & Zwiebel, *supra* note 30, at 182.

98. Charles Winick, *Social Behavior, Public Policy, and Nonharmful Drug Use*, 69 MILBANK QUARTERLY 437 (1991).

Of course, this view of drug consumption as a largely harmless activity is not always accurate. Many individuals unavoidably maintain an imbalanced relationship with narcotic substances that often jeopardizes their health and productivity. Nonetheless, it remains clear that any "objective evaluation of prohibition . . . should include any reduction in rational drug consumption" as a cost of the prohibition regime.[99] Yet even when drug consumption is a rational decision and a benefit to the individual consumer, such activity may still cause harm to innocent third parties and society at large. Indeed, individual drug consumption often generates negative externalities,[100] implying that the socially optimal level of drug consumption is less than any individually optimum level might be.

Although often overstated, the negative externalities of drug use are significant in some cases. For instance, drug use increases healthcare costs, including expenditures for drug abuse treatment and victims of drug-related crime.[101] In fact, drug-related incidents in the United States are estimated to cost $11 billion annually.[102] Approximately two million emergency room visits in 2009 were the result of illicit drug use.[103] Some might also suggest that the immorality of drug consumption justifies taking a hardline stance against drug use. Although a discussion of the morality of drug consumption is outside the scope of this Article, it suffices to note that a prohibitionist system "is not the only policy that can send a message about society's disapproval of drug consumption."[104] In weighing the effects of drugs and drug controls, moralists must account for the many costs created by prohibitive control regimes and consider the ethical responsibility governments have to minimize those consequences.

It is important to acknowledge that the costs derived from drug use are substantially separate and distinguishable from the costs created by drug prohibition. Prohibitionist controls cause many negative social effects including increased crime rates, prison overpopulation, and overburdened social services. Governments and independent organizations are unable to provide treatment and prevention services to drug users. As a result, many drug-related health problems result, including the spread of disease, preventable drug-related illnesses, and deaths resulting from overdose. Ultimately, many of the harms created by drug consumption are directly attributable more to the prohibitionist controls than the act of drug consumption, itself.

---

99. *The Economics of Drug Prohibition*, *supra* note 1, at 844.

100. Miron & Zwiebel, *supra* note 30, at 183.

101. MIRON CRITIQUE, *supra* note 28, at 5.

102. UNITED STATES DEP'T OF JUSTICE, NAT'L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT 2011 4 (2011), *archived at* http://perma.cc/89ZU-C4N9 [hereinafter NDIC].

103. *Id*. at 3.

104. *The Economics of Drug Prohibition*, *supra* note 31, at 847.

B. The Costs and Benefits of Drug Prohibition

Advocates of prohibition often claim that crime is a direct consequence of drug consumption,[105] implying that prohibition serves to reduce crime to the extent that it reduces drug use. However, empirical studies show there is a lack of causal connection between the tendency to commit crime and the tendency to use drugs.[106] Instead, it is likely the prohibition policies themselves that breed most drug-related violence. In fact, prohibition is shown to cause an increase in income-generating crime rates such as theft and prostitution.[107] Also, fluctuations in the US homicide rate over the past century correlate positively with enforcement of drug prohibition laws.[108] Such studies indicate that many social ills commonly associated with narcotic drugs do not come from the *actual* use of drugs, *per se*, but rather from users' struggle to obtain illicit drugs and evade law enforcement.

Regardless, prohibitionist drug policies may be furthered because some individuals and entities are positioned to derive great benefit from their maintenance. Politicians who endorse prohibition can quickly gain political ground by criticizing opponents who endorse less restrictive alternatives. Also, participants in the healthcare and pharmaceutical industries profit from the illegality "of [narcotic] goods easily substitutable for their own."[109]

Nonetheless, the primary justification of drug prohibition is its purported effect of limiting the drug supply and reducing the overall demand for drugs.[110] However, evidence largely indicates that prohibitionist policies fail to achieve their stated objectives of reducing drug consumption and production.[111] Economists suggest that because the demand for drugs is relatively inelastic, any prohibition-induced shift in supply has a relatively small affect on the quantity of drugs consumed.[112] Indeed, empirical evidence indicates that prohibition is ineffective at reducing drug consumption by any significant margin; in the United States, drug prices have been stable or declining despite continuous increases in prohibitionist

105. MIRON CRITIQUE, *supra* note 28, at 12.

106. MIRON CRITIQUE, *supra* note 28, at 12 (emphasis added).

107. MIRON CRITIQUE, *supra* note 28, at 12.

108. MIRON CRITIQUE, *supra* note 28, at 12.

109. MIRON CRITIQUE, *supra* note 28, at 12.

110. This result comes imposing legal penalties for possession, increasing greater uncertainty about product quality, and other costs and dangers associated with transactions in an illegal market.

111. Swanson, *supra* note 7, at 792; Seth Harp, *Globalization of the U.S. Black Market: Prohibition, The War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1667 (2010).

112. Miron & Zwiebel, *supra* note 30, at 176; *see also* Swanson, *supra* note 7, at 792; Harp, *supra* note 111, at 1669.

efforts.[113] Crop eradication efforts by the United States abroad merely serve to sporadically and temporarily prevent impoverished farmers from growing highly valued drug-producing crops.[114] Aid leveraging is also largely ineffective in suppressing the overall production of drugs. For example, after the United States threatened to suspend economic aid to Turkey, the Turkish government agreed to implement specific supply reduction policies, which cause the Mexican supply of drugs to the United States to increase.[115] In all, it is clear that, despite such efforts, illicit drugs remain a widely accessible and extremely profitable commodity in the world market.

It is apparent that US eradication efforts fail to eliminate or substantially reduce the production of illicit drug substances. But worse is the fact that prohibitive drug control policies impose a significant number of threats and negative effects on society. As the Secretary-General of the UNODC conceded, the continued operation of the prohibitive drug control regime has several "unintended consequences."[116] The following sections provide a brief overview of the commonly recognized costs of drug prohibition policies.

1. Creation of a Black Market

Prohibition policies effectively create a black market for narcotic substances by monopolizing the market for producers willing to assume the risks of illegal business. While millions of users are forced to obtain drugs through illicit means, drug traffickers continue to obtain enormously high profit margins.[117] These high margins reflect the drug traffickers' willingness to assume significant risks associated with black markets operations, including potential criminal sanctions, violence, and death.

---

113. Keefer et al., *supra* note 3, at 6-7.

114. Raustiala, *supra* note 14, at 99-100. Eradication in one region merely displaces drug production to another. Swanson, *supra* note 7, at 792. For instance, while aerial eradication in Colombia has been shown to markedly reduce production in some target regions, such success is regularly accompanied by increased crop production in others areas. VEILLETTE & NAVARRETE-FRÍAS, *supra* note 70, at 5. Also, decreased opium production in the Golden Triangle that resulted from stricter supply controls ultimately led to large increases in opium production in Afghanistan. Heilmann, *supra* note 6, at 268.

115. Murphy, *supra* note 72, at 1275. In fact, the US Department of Justice acknowledges that, despite significant government efforts to limit drug use, "[o]verall drug availability is increasing." NDIC, *supra* note 102, at 2 (alteration added).

116. *See* Heilmann, *supra* note 6, at 267-268. Many of these social ills are widely acknowledged in scholarship, media, and political discourse. *See*, e.g., Kevin Hartnett, *From Small Corners to Big Cartels, the Drug War's Unintended Consequences*, PENN. GAZETTE (Oct. 28, 2009), http://www.upenn.edu/gazette/1109/gaz04.html, *archived at* http://perma.cc/976R-Y2K7; Ricky N. Bluthenthal, *Collateral Damage in the War on Drugs: HIV Risk Behaviors Among Injection Drug Users*, 10 INT'L J. DRUG POL'Y 25 (1999).

117. Blumenson & Nilsen, *supra* note 92, at 49.

Processed cocaine that is available in Colombia for $1,500 per kilo sells for $66,000 on the streets of the United States.[118] A kilo of heroin selling for $2,600 in Pakistan can be peddled for as much as $130,000 in the United States.[119] Meanwhile, drugs themselves remain unregulated,[120] thus eliminating any chance for government control over purity, potency, labeling, advertising, or availability. Additionally, users of low-impact drugs (e.g., cannabis users) are forced to buy from criminal dealers who may also sell "harder" drugs (e.g., opiates), a phenomenon that increases the likelihood that the youth population will gain access to, and potentially abuse, harsher substances.[121]

2. Violence and Corruption

Prohibition threatens the security and wellbeing of many peoples affected by the War on Drugs and increases the potential for violent crime. Without access to a state-sponsored dispute resolution forum, all transactions in the illicit drug market take place outside the traditional civil justice system, leaving violence as the primary dispute resolution mechanism. The prevalence of violence in the drug production industry encourages the creation of organized crime groups, which further increases incidents of crime, violence and death borne from drug related activities. Meanwhile, the supply of drugs to consumers remains constant: the only change is an increased price and reduced product quality.[122] Prohibition also increases the prevalence of corruption by forcing market participants to conduct business illegally, thus incentivizing bribery and extortion of local officials, legislators, and judges in drug producing countries.[123]

---

118. These estimates reflect prices in the late 1990s, and are reflected in constant 1998 dollars. Oriana Zill & Lowell Bergman, *Do the Math: Why the Illegal Drug Business is Thriving*, FRONTLINE (Jan. 12, 1998), http://www.pbs.org/wgbh/pages/frontline/shows/drugs/special/math.html, *archived at* http://perma.cc/V6CL-RN3K.

119. *Id.*

120. Blumenson & Nilsen, *supra* note 92, at 49.

121. Blumenson & Nilsen, *supra* note 92, at 7.

122. Harp, *supra* note 111, at 1670.

123. Raustiala, *supra* note 14, at 100-01. In Peru, for example, corruption is pervasive throughout the political system, affecting almost seventy percent of all political dealings. TRANSPARENCY INT'L, REPORT ON THE TRANSPARENCY INTERNATIONAL GLOBAL CORRUPTION BAROMETER 2006 14 (2006), *archived at* http://perma.cc/P8BM-YSK8. In Mexico, transnational criminal organizations "have infiltrated every layer of society in Mexico," increasing incidences of narco-terrorism and drug-related violence throughout Central America. Harp, *supra* note 111, at 1676. *See also* Drummond, *supra* note 77, at 125. Highly organized and equipped with an arsenal of weaponry, these cartels routinely fight in street battles with government infantry, extort and murder public officials, and torture cartel enemies. Harp, *supra* note 111, at n.113.

3. Impaired Health

Drug prohibition hinders drug treatment efforts and diminishes societal health. Prohibitionist control systems promote widespread fear of legal repercussions among drug users and so serve to discourage drug users from admitting their illegal use or seeking drug treatment. Criminalization of relatively low-impact drugs (e.g., cannabis) dramatically increases the number of drug offenders placed in the penal system, burdens drug treatment facilities with the care of low-impact drug users, and reduces the treatment space available for users of harder substances.[124] Also, because drug prohibition has forced the street price for drugs to significantly increase, users are incentivized to switch to using cheaper yet more physically harmful synthetic drugs like methamphetamine and bath salts.[125] Many times, these cheaper drugs are of a lower quality and create more serious and frequent health problems for users than non-synthetic drugs.[126]

4. Productivity Loss

Prohibition also affects productivity through the imposition of criminal penalties that impose significant lifelong burdens on individuals accused or convicted of drug-related crimes. Sanctions can include loss of professional license, barriers to employment opportunities, loss of financial aid for education, suspension of driver's license, and limits on adoption, voting and government service.[127] Productivity in drug producing countries is further hindered by the pervasive violence that stems from drug control activities. Prohibition contributes to the weakening of social stability, stifles economic productivity, and promotes civil unrest in drug-producing countries by providing a source of income to rebel groups and fueling an underground battle for control of the transnational drug market.[128]

---

124. Blumenson & Nilsen, *supra* note 92, at 52.

125. Abby Goodnough & Katie Zezima, *An Alarming New Stimulant, Legal in Many States,* N.Y. TIMES (Jul. 16, 2011), http://www.nytimes.com/2011/07/17/us/17salts.html?pagewanted=all, *archived at* http://perma.cc/7KMN-UAUX.

126. Blumenson & Nilsen, *supra* note 92, at 50.

127. *See* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS (2005). Every year approximately 17,000 to 20,000 students lose access to Pell Grants and 29,000 to 41,000 lose access to student loans. *Id*. at 12. As a result the, many low-income and minority individuals who lack alternative funding sources for education are prevented from obtaining higher education. *Id*. at 6.

128. MIRON CRITIQUE, *supra* note 28, at 14.

C. An Important Consideration: Infringements on Developmental Rights

In addition to these commonly recognized costs, this Article calls attention to an additional consequence of prohibitionist drug policy: the violation of developmental rights of peoples in drug producing countries. Prohibition creates particularly high social costs for many peoples, especially individuals living in countries involved in the international conflict over narcotic drugs. Beyond the violence and corruption-producing effects previously discussed, drug prohibition promotes civil unrest and economic oppression in drug producing countries that ultimately results in an infringement of developmental human rights.

The barriers to development created by prohibitionist policies are numerous. Public funds that may have been used for investments in health, education, and infrastructure development are instead allocated to the drug enforcement regime, including police, judiciary system, and prisons. Prohibition encourages the destruction of private property and expropriates the wealth of poor farmers involved with drug crop cultivation.[129] Public safety and security are undermined, leaving entire national governments weakened by the plague of corruption and violence that accompanies the illicit drug industry.

"[D]rug controls are not an end in and of themselves . . . the ultimate objective of drug control efforts is to improve public health and to limit human suffering."[130] Unfortunately, extreme actions undertaken in the War on Drugs—including military operations against farmers, chemical crop eradication campaigns, and widespread imprisonment of drug users—have yielded human rights abuses, marginalized international security, and created barriers to sustainable global development.[131]

States are obligated to honor developmental rights in drug control policymaking and activities though the promulgation of treaties, peremptory norms (*jus cogens*), and customary international law. Such obligations are primarily established in the U.N. Charter; as the preeminent international treaty, the U.N. Charter makes binding on all states the protection and furtherance of human rights for all peoples.[132] The Charter references human rights numerous times, listing among the purposes of the United Nations "international cooperation in promoting and encouraging respect for human rights."[133] Today, it is widely acknowledged that "a minimum

129. *See* Keefer et al., *supra* note 3, at 20.

130. Heilmann, *supra* note 6, at 265.

131. Heilmann, *supra* note 6, at 265.

132. Heilmann, *supra* note 6, at 270. Many view the U.N. Charter as the quasi-constitution of the international community "in the sense that it is a set of rules of international law which takes precedence over other norms because their existence is a precondition to the validity of the latter." Heilmann, *supra* note 6, at 270.

133. Heilmann, *supra* note 6, at 270.

standard of human rights obligations exists that no State can ignore."[134]

The international community widely recognizes the right to development as a fundamental human right that integrates economic, social, and cultural rights with civil and political rights.[135] The United Nations Universal Declaration of Human Rights and the United Nations Declaration on the Right to Development (the Declaration), agreements that have both been widely adopted among U.N. member States, unequivocally proclaim the validity of the human right to development.[136] As a fundamental human right, State recognition of the developmental right requires that the State provide positive conditions for peoples to fully participate in the affairs of society.[137]

Specific protections afforded by developmental rights are outlined in the text of the Declaration. Article 1 of the Declaration states: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized."[138] States are widely bound to take joint and separate action to promote high standards of living, full employment, and conditions of economic and social progress of all peoples through the "creation of national and international conditions favourable [sic] to the realization of the right to development."[139]

The Declaration also acknowledges peoples' right to self-determination, and recognizes the "human person" as "the active participant and beneficiary of the right to development."[140] The right to development harbors for all peoples the opportunity to equally participate in "a particular process of development in which all human rights and fundamental freedoms can be fully realized," and requires implementation of transparent and accountable systems that afford equal opportunity of access to the resources necessary for development.[141]

Recognition of these protections necessarily creates an affirmative responsibility on States to create "national and international conditions favorable to the realization of the right to development."[142] Indeed,

---

134. Heilmann, *supra* note 6, at 270.

135. Arjun Sengupta, *The Right to Development as a Human Right*, 36 Econ. & Pol. Wkly. (1999).

136. *Id.* at 1.

137. The United States is the only U.N. Member State that has not yet ratified the Declaration. *Id.* at 2.

138. Declaration on the Right to Development, U.N. Doc A/RES/41/128 art. 1 (Dec. 4, 1986).

139. *Id.* art. 3.

140. *Id.* art. 2, cl. 1.

141. Sengupta, *supra* note 135, at 5.

142. Declaration on the Right to Development, U.N. Doc A/RES/41/128 art. 3 (Dec. 4, 1986).

international cooperation is a fundamental requirement inscribed throughout the Declaration, proclaiming that "all states should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms."[143] Article 3 notes that "the realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations."[144] Thus, States are obliged to work cooperatively toward the elimination of "flagrant violations of human rights," such as foreign domination and occupation.[145] It follows that the Declaration encourages States to design and adopt policies that do not hinder the developmental process for all peoples.

Although the United States has not yet ratified the Declaration, US obligations to protect developmental rights are firmly established in customary international law and the norms of *jus cogens*. These customary legal obligations are derived from the consistent practice of a significant number of States, including the United States, which foster continued economic development in drug producing nations.[146] In a sense, customary law is "nontreaty law generated through consistent practice accompanied by a sense of legal obligation."[147] Early interpretations of the right to development extended customary legal status to only a handful of protections, including "slavery, genocide, arbitrary killings," and the like.[148] But today, "a compelling argument can be made that a significant range of socioeconomic rights have acquired the status of customary law."[149]

The United States actively demonstrates a clear commitment to promoting economic progress in developing nations. The 1961 Foreign Assistance Act permits the president to provide assistance to extend economic and technical aid to rural farmers of foreign nations "to provide a more viable economic base and enhance opportunities for improved incomes, living standards, and contributions by rural poor people to the economic and social development of their countries."[150] Interestingly, the Act also stipulates that aid will not be provided to any nation that "engages in a consistent pattern of gross violations of internationally recognized

143. *Id.* art. 6.

144. *Id.* art. 3, cl. 2.

145. *Id.* art. 5.

146. *Customary International Law*, USLEGAL.COM, http://internationallaw.uslegal.com/sources-of-international-law/customary-international-law/ (last visited Mar. 2, 2014, *archived at* http://perma.cc/4ZZS-GQAE).

147. Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 470 (2009).

148. *Id.*

149. *Id.*

150. 22 U.S.C. § 2151(a) (2000).

human rights . . . including torture or cruel, inhuman, or degrading treatment or punishment . . . causing the disappearance of persons . . . or other flagrant denial of the right to life, liberty, and the security of person."[151]

Several agencies were created under the Foreign Assistance Act[152] to administer foreign aid, including the US Agency for International Development (USAID). Presently, USAID promotes "broad-based economic growth by addressing the factors that enhance the capacity for growth and by working to remove the obstacles that stand in the way of individual opportunity."[153] USAID specifically addresses the economic crises borne from US antinarcotics efforts by promoting "sustainable and equitable economic growth opportunities in regions vulnerable to drug production and conflict."[154]

Despite these clear commitments of the United States to improving economic conditions abroad, US drug prohibition affirmatively stifles economic growth and violates developmental rights for many peoples in drug-producing countries. Prohibition puts "money in the pockets of criminals and armed groups" and erodes the democratic protections of the people most closely affected by the War on Drugs.[155] Punitive drug laws facilitate disappearances, inhumane treatment, and extrajudicial killings of drug market participants.[156] Increased corruption and violence occurs against drug traffickers, politicians, police, judges, and armed forces, fueling the depletion of State authority, regional stability, and social security for many peoples in drug producing countries.[157]

---

151. 22 U.S.C. § 2304(a)(2), (d)(1) (2013).

152. 22 U.S.C. § 2151 et seq.

153. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, OFFICE OF THE FEDERAL REGISTER, THE UNITED STATES GOVERNMENT MANUAL 482-85 (2013), *archived at* http://perma.cc/R6P6-F2BC (section on United States Agency for International Development).

154. U.S. DEPT. OF STATE & U.S. AGENCY FOR INT'L DEV., JOINT SUMMARY OF PERFORMANCE AND FINANCIAL INFORMATION: FISCAL YEAR 2010 33 (2011), *archived at* http://perma.cc/HK2W-PB3Y.

155. Jonathan Glennie, *Drugs are a Development Issue - Which is Why We Should Legalise Them*, THE GUARDIAN (Oct. 5, 2010), http://www.theguardian.com/global-development/poverty-matters/2010/oct/05/drugs-prohibition-development-issue-legalisation, *archived at* http://perma.cc/5C56-SMXB.

156. TRANSFORM DRUG POLICY FOUNDATION, THE WAR ON DRUGS: UNDERMINING INTERNATIONAL DEVELOPMENT AND SECURITY, INCREASING CONFLICT, *archived at* http://perma.cc/WF5H-HS72; *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs,"* HUMAN RIGHTS WATCH (Nov. 9, 2011), http://www.hrw.org/reports/2011/11/09/neither-rights-nor-security, *archived at* http://perma.cc/X7EY-52CX.

157. COUNT THE COSTS, THE WAR ON DRUGS: UNDERMINING INTERNATIONAL DEVELOPMENT AND SECURITY, INCREASING CONFLICT (2011), *archived at* http://perma.cc/XU59-ZRYF.

Furthermore, crop eradication efforts strip farmers of their private property and threaten local ecosystems, biodiversity, and the health of indigenous and small farming communities. Imprecise aerial spraying and unavoidable crosswinds often cause the herbicides to drift into non-target areas, resulting in the destruction of licit crops and contamination of water sources.[158] Significant forest contamination can and does result, causing loss of habitat for many species and posing a serious threat to the health of local peoples and the surrounding ecosystems.[159] Health impacts of glyphosate are significant, including impairment of the nervous system (dizziness, headaches), digestive system (nausea, abdominal pains, diarrhea), and skin (sores, ulcers).[160] Hospitals near the eradication sites report "increased visits for skin problems, abdominal pain, diarrhea, gastrointestinal infections, acute respiratory infection, and conjunctivitis following spraying in rural areas surrounding their municipalities."[161]

IV. PROPOSED SOLUTIONS

It is clear that the US drug control system and its war against drugs facilitates broad human rights abuses, threatens international security, and "builds barriers to sustainable development."[162] The burdens created by the US drug control regime must be lifted from the shoulders of the peoples whose most viable economic opportunities lie in the cultivation of their indigenous crops. Pursuant to its obligations in international law, US policymakers must pursue a more balanced drug control policy that comprehensively considers all human rights, including the developmental rights of peoples in drug producing countries.

To this end, drug controls must be measured not by the quantity of drugs consumed, but instead by their impacts on quality of life and health for all affected people. The United States must act pursuant to the United

158. "Aerial spraying in some cases has inadvertently drifted onto crops such as coffee, yucca, and rice." Judith Walcott, *Spraying Crops, Eradicating People*, CULTURAL SURVIVAL (May 5, 2010), http://www.culturalsurvival.org/publications/cultural-survival-quarterly/spraying-crops-eradicating-people, *archived at* http://perma.cc/95NN-4RSV.

159. The United States Environmental Protection Agency ranked glyphosate as the third most injurious pesticide. U.S. ENVTL. PROT. AGENCY, REREGSTRATION ELIGIBILITY DECISION (RED): GLYPHOSATE 22 (1993), *archived at* http://perma.cc/S44K-T4SZ. A report by the Inter-American Drug Abuse Control Commission concluded that glyphosate poses a "significant risk to human health." DR. KEITH R. SOLOMON ET AL., INTER-AM. DRUG ABUSE CONTROL COMM'N, ENVIRONMENTAL AND HUMAN HEALTH ASSESSMENT OF THE AERIAL SPRAY PROGRAM FOR COCA AND POPPY CONTROL IN COLOMBIA 121 (2005), *archived at* http://perma.cc/Q5TZ-T35L; *see also* Danielle Knight, *Plan Colombia: Fumigation Threatens Amazon, Warn Indigenous Leaders,* SCIENTISTS (Nov. 21, 2000), *archived at* http://perma.cc/4JTM-LUZU.

160. *Id.*

161. Walcott, *supra* note 158.

162. Heilmann, *supra* note 6, at 265.

Nations Charter and Universal Declaration of Human Rights to promote full participation of all peoples in the affairs of society.[163] Efforts must be refocused on reducing demand for the most hazardous drugs, aiding the most vulnerable populations, and generally seeking to minimize the individual and societal damage produced by drugs and drug controls alike.

In order to effectuate such changes, practical and realistic modifications must be made to the US prohibitionist control system. Many commentators suggest that widespread legalization of drugs in the United States is a viable option for reducing the problems of drug prohibition.[164] As economist and prohibition expert Jeffrey Miron suggests, "Given the evidence . . . a free market in drugs is likely to be a far superior policy to current policies of drug prohibition."[165] However, complete legalization of narcotics at the federal level is simply not a realistic proposition in today's political climate.[166] Many policymakers fear that a relaxation of prohibitionist controls would lead to an increase in drug abuse in the short term and possibly a significant increase in drug-related problems in the long run. Some also suggest that "legalization would send the wrong message to children and encourage [drug use] by making [drugs] more readily available."[167] Despite these contentions, it remains clear that the global consequences of drug prohibition necessitate a sizable policy revision.

As a practical suggestion, this Article proposes that US decision-makers embrace a federal policy of *controlled legalization* of the least harmful illicit drugs that are commonly consumed in the United States. For instance, nationwide legalization of cannabis would serve to alleviate a portion of the problems created by drug prohibition without causing great disruption to social stability.

Under the current federal drug laws, cannabis is designated as a Schedule I controlled substance, a category of drugs reserved for substances with a high potential for abuse and no government-acknowledged medical use. Nonetheless, cannabis remains the world's most widely used illicit substance.[168] In 2007, there were an estimated 160 million cannabis users worldwide, compared to just forty million users of amphetamines, cocaine,

---

163. Blumenson & Nilsen, *supra* note 92, at 54.

164. Miron & Zwiebel, *supra* note 30, at 190.

165. Miron & Zwiebel, *supra* note 30, at 190.

166. Miron does not suggest that full legalization is the only policy alternative, but rather that "given the evidence…a free market in drugs is likely to be a far superior policy to current policies of drug prohibition." Miron & Zwiebel, *supra* note 30, at 190. Economists suggest that under a legalized system, the prevalence of cocaine consumption is likely to increase by 50 to 80 percent. Keefer et al., *supra* note 3, at 17.

167. Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1708-1709 (2009).

168. BEAU KILMER & ROSALIE LICCARDO PCULA, RAND CORPORATION, TECHNICAL REPORT: ESTIMATING THE SIZE OF THE GLOBAL DRUG MARKET (REPORT 2) 10 (2009), *archived at* http://perma.cc/BNM3-8N7R.

and opiates combined.[169] This high rate of cannabis use, combined with the prohibitionist restrictions imposed on the cannabis market, contributes significantly to the social problems commonly attributed to drug consumption in the United States. Estimates suggest that the total current expenditures for US cannabis-prohibition enforcement efforts alone exceed $8 billion annually.[170] Despite these efforts to eliminate its production and consumption, cannabis remains widely available and regularly supplied by transnational criminal organizations.

Although opponents of legalization maintain that cannabis is a harmful substance void of any beneficial use,[171] many negative perceptions of cannabis have been scientifically refuted in recent years. Medical research indicates that cannabis is not physically addictive and does not have significant negative health consequences, even when consumed in large doses.[172] Also, an increasing number of medical authorities acknowledge the therapeutic and medicinal value of cannabis.[173] Research from many countries indicates that cannabis serves as a market substitute for other drugs and dampens the use and effects of alcohol, tobacco, and other more harmful and dangerous drugs.[174] The misconception that cannabis is a "gateway drug" has also been widely refuted by experts. Under a prohibition control system, cannabis can only be acquired for recreational use by purchasing from individuals providing access to harder drugs.[175] However, it is not "[cannabis] use that leads to harder drugs, but the method of acquisition."[176] A controlled and regulated cannabis market would provide the millions of US cannabis users with a legitimate supply and further isolate the distributors of harsher substances from the many cannabis consumers.

Cannabis legalization would result in immediate savings of billions of dollars for local, state, and national governments. Police and judicial systems would no longer arrest and prosecute individuals for cannabis

---

169. Heilmann, *supra* note 6, at 262. Mexico alone produces more than ten million kilograms of marijuana annually for supply to the United States. Duncan, *supra* note 167, at 1715.

170. Duncan, *supra* note 167, at 1712.

171. Duncan, *supra* note 167, at 1706.

172. Miron & Zwiebel, *supra* note 30, at 187; Duncan, *supra* note 167, at 1706, n.18.

173. Duncan, *supra* note 167, at 1707. Scientific evidence suggests that cannabis provides relief for several ailments and "alleviates symptoms of glaucoma, epilepsy, multiple sclerosis, AIDS, and migraine headaches." MIRON CRITIQUE, *supra* note 28, at 15.

174. KENNETH W. CLEMENTS & MERT DARYAL, THE ECONOMICS OF MARIJUANA CONSUMPTION 33-34 (1999), *archived at* http://perma.cc/FAG6-9K7V; Duncan, *supra* note 167, at 1707. Scientific evidence suggests that cannabis provides relief for several ailments and "alleviates symptoms of glaucoma, epilepsy, multiple sclerosis, AIDS, and migraine headaches." MIRON CRITIQUE, *supra* note 28, at 15.

175. Duncan, *supra* note 167, at 1708.

176. Duncan, *supra* note 167, at 1707.

cultivation, sale, or possession. The US state and federal expenditures aimed at prohibiting cannabis—currently estimated at more than $8 billion per year—would be virtually eliminated.[177] Controlled legalization would also encourage domestic cannabis production and provide a foundation for the development of a new licit economy dedicated to the production and sale of cannabis. A controlled system of cannabis legalization would allow for the taxation and regulation of the cannabis market, including income and sales taxation, OSHA mandates, and environmental and labor market regulations.[178] Such taxation would "generate billions of dollars for our state and local governments to fund what matters most: jobs, healthcare, school and libraries . . . and more."[179]

Most importantly, legalization of cannabis would significantly reduce the size and strength of criminal drug supply networks operating in the black market, and expand developmental opportunities for millions of individuals. Legalization would provide a licit supply source for cannabis and sizably reduce the demand for other illicit drugs. The transnational criminal supply networks for cannabis would be virtually eliminated, reducing cartel profits and corruption, leading to an overall decrease in violent incidents stemming from the illicit drug trade. Disputes between cannabis producers would be resolved through the state judicial system, further decreasing the prevalence of violence and corruption both domestically and abroad. A legitimate and regulated cannabis industry would provide employment opportunities and reduce many social and political implications of black market drug operations, including "corruption, violence, organized crime, and international arms trafficking."[180] Also, legalization would reduce the harsh impacts of criminal laws related to cannabis, particularly for low-income and minority cannabis users, and provide farmers in developing countries with a licit and viable crop alternative.

V. CONCLUSION

The failures of the US prohibitionist drug control system are apparent and undeniable. For decades, US drug prohibition efforts, both domestic and abroad, have fallen short of creating any meaningful reduction in the consumption of illicit drugs. Worse is the fact that these strict prohibitionist

177. Blumenson & Nilsen, *supra* note 92, at 10.

178. MIRON CRITIQUE, *supra* note 28, at 10. In 2009, Oakland, California became the first city in the US to directly tax cannabis by imposing a 1.8 percent gross receipt tax on medical cannabis sold in the city. Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKELEY J. CRIM. L. 163, 169 (2010). This tax is expected to generate more than $400,000 in annual revenue for the city. *Id*.

179. *Id.* at 188.

180. Swanson, *supra* note 7, at 793.

policies consistently foster a multitude of social and economic difficulties for many peoples throughout the world. The system's costs are not adequately or wholly considered. Policymakers continually neglect the costs of these prohibitionist controls, and fail to equally and adequately account for their harsh impacts. US decision-makers view the foreign drug control efforts as necessary for ensuring the health and prosperity of US society. Improper emphasis is all too often placed on the deterrent and punitive forces of drug control measures. Worse still is the fact that state officials often overlook the developmental human right in drug policymaking, despite clear national commitments to uphold such right in the United Nations Universal Declaration of Human Rights and the United Nations Declaration on the Right to Development.

Lawmakers must pursue a more balanced drug control policy that comprehensively considers all human rights, including the developmental rights of peoples in drug producing countries. States must be held accountable for their commitments to uphold and honor all internationally recognized human rights, including the right to full participation in economic activities. The full participation of all peoples in the social and economic affairs of their societies should be fairly promoted and equally accounted in US policymaking.

Drug control efforts must be practically and fairly adjusted, and the policy focus must be set on aiding vulnerable populations and minimizing the damages created by government-imposed drug market controls. Policy should aim to reduce the market share and political strength of transnational criminal organizations, not merely to create temporary impediments to the inflow of drugs into the United States. To this end, ineffective measures should be adjusted or altogether abandoned. The time has come for US policymakers to realign their priorities in favor of promoting human rights both domestically and abroad to enlarge developmental opportunities for millions.

SHOUT FOR FREEDOM TO CURSE AT THE KINGDOM: CONTRASTING THAI LÈSE MAJESTÉ LAW WITH UNITED STATES FIRST AMENDMENT FREEDOMS

Sukrat Baber*

I. INTRODUCTION

A. Thai Lèse-majesté Law

Lèse-majesté (or lese majesty) laws prohibit insults, defamation, and criticism towards royal sovereigns of States.[1] In an age of rising transparency and fight for democracy, these laws are seldom enforced and seem to be disappearing in countries where they exist.[2] However, Thailand's lèse majesté laws, more than 100 years after their implementation,[3] are still strongly enforced—more than 400 cases came to trial between 2006 and 2011.[4] To avoid reprimand, citizens must at all times be wary of their public or even private discussions and published works relating to Thailand's royalty. One need not look further than the codified law to understand the length and strength of its reach: Section 112 of the Thai Criminal Code states, "Whoever, defames, insults or threatens the King, the Queen, the Heir-apparent or the Regent, shall be punished with imprisonment of three to fifteen years."[5]

---

* Sukrat Baber is a 2014 J.D. graduate of Indiana University Robert H. McKinney School of Law. Mr. Baber was inspired to write about this topic after he arrived in Thailand for an internship in the summer of 2012, and was advised that he was better off not speaking about the Thai king at all because almost any comment could be construed as insulting the revered king and cause social or legal issues.

1. *See* CRIMINAL CODE [CRIM. C.] B.E. 2499 (1956), s. 112, *amended by* CRIM. C. (No. 17), B.E. 2547 (2003) (Thai.); *see also* David Streckfuss, *Kings in the Age of Nations: The Paradox of Lese-Majeste as Political Crime in Thailand*, 37 COMP. STUD. SOC'Y & HIST. 445, 463 n.25 (1995) ("Rattana Utthaphan, a student who wrote a personal letter to the king asking him to abdicate and enter politics, and the late Anan Senaakhan, who made two speeches criticizing the Queen at Sanam Luang, were each given six years.").

2. *See generally* Streckfuss, *supra* note 1.

3. *Thailand's King Pardons Swiss Man*, BBC NEWS (Apr. 12, 2007), http://news.bbc.co.uk/2/hi/asia-pacific/6547413.stm, *archived at* http://perma.cc/4TQR-4BDH.

4. Todd Pitman & Sinfah Tunsarawuth, *Thailand Arrests American for Alleged King Insult*, ASSOCIATED PRESS (May 28, 2011), http://sg.news.yahoo.com/thailand-arrests-american-alleged-king-insult-073615032.html, *archived at* http://perma.cc/GL5R-LCKK.

5. CRIM. C. B.E. 2499 (1956), s. 112, *amended by* CRIM. C. (No. 17), B.E. 2547 (2003) (Thai.).

B. US First Amendment Freedoms

The United States has unique free speech laws deriving from the First Amendment of the US Constitution.[6] The rights of freedom of speech and freedom of expression are cornerstones of the democracy envisioned by the drafters of the Bill of Rights.[7] They allow individuals to carry out peaceful protests in public venues without fear of government intervention, express opinions among friends and family without fear of the law, and publish virtually any work to the masses without fear of censorship. Unlike other developed countries, the United States does not categorically prosecute hate speech towards people or groups.[8] Some commentators are concerned that allowing "freedom to hate" is problematic for moral and practical reasons (*e.g.*, hateful publications inciting violence), but the Supreme Court has continued to protect such speech.[9]

C. Near-Polar Opposites

This Note first discusses the respective turbulent histories of Thai lèse-majesté law and US First Amendment freedoms. Case law and popular events are discussed to draw the timelines for each. Next, this Note looks at the issues the two countries and their laws present today. Throughout the historical narratives, this Note points to some theoretical inconsistencies and analyses the political and legal ramifications of the laws' developments. Special attention is placed on whether lèse-majesté law is anachronistically out of place and on the contours of protected hate speech in the United States. Then, this Note compares and contrasts the speech laws of the two nations. In particular, this Note argues that the two nations represent the extremes of freedom to speak out against power and cultural issues. Thai lèse-majesté law forbids inhabitants to speak critically of the country's

---

6. U.S. CONST. amend. I.

7. "[James] Madison proposed . . . 'the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.'" Stewart Jay, *The Creation of the First Amendment Right to Free Expression: from the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 791 (2008) (quoting Madison Resolution (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12 (Helen E. Veit, et al. eds., 1991)).

8. Frederick Schauer, *The Exceptional First Amendment* 8 (Harv. Univ., John F. Kennedy Sch. Gov't, KSG Faculty Research Working Papers Series, Paper No. RWP05-021, 2005).

9. Michael W. McConnell, *You Can't Say That: 'The Harm in Hate Speech,' by Jeremy Waldron*, N.Y. Times, (June 22, 2012) (book review), http://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html, *archived at* http://perma.cc/A8KS-WZWU.

royalty.[10] This Note will show that "criticism" as it relates to the law is defined very broadly, and breaching the law means years of incarceration. This law is contrasted by the near-unfettered First Amendment freedom to criticize anyone or voice any range of opinion privately and publicly, even when causing the listener great emotional distress.[11] Ultimately, this Note argues that Thai lèse-majesté laws should borrow from First Amendment freedoms and effectively be repealed, but the different social and cultural dynamics of Thailand require a cautioned transition from the vices of lèse-majesté to a nation-wide discourse regarding the monarchy.

II. HISTORY OF THAI LÈSE-MAJESTÉ LAW

A. Inception and Early Application

The law of lèse-majesté in Thailand appeared in section 98 of the nation's first Criminal Code: "Whoever threatens, insults or defames the King, the Queen, the Crown Prince, or the Regent during the Regency, shall be punished with imprisonment not exceeding seven years and fine not exceeding five thousand ticals."[12] Although Thai lèse-majesté law seemed to go into a decline as of 1932 until the revision of the Code in 1957,[13] there was a notable case before the end of former decade in 1939.[14] Paa Huu'chonhua claimed to be a sorcerer or magician that could treat villagers' ailments through supernatural powers.[15] He claimed that one of his powers was bringing the king and the constitution to his mercy.[16] Charged with "telling a startling false-hood," he was sentenced to one year of imprisonment by the lower court.[17] The High Court, however, ruled that his wording was "without ill intentions and did not aim to cause people to look down on or despise anyone."[18] Thus his wording was held as not violating lèse-majesté law.[19] Since most of the cases to be discussed in this Note have resulted in guilty convictions, the case of Paa is noteworthy as an example

10. CRIM. C. B.E. 2499 (1956), s. 112, *amended by* CRIM. C. (No. 17), B.E. 2547 (2003) (Thai.).

11. *See infra* Part V.D.

12. PENAL CODE [PENAL C.] R.S. 127, § 98 (Penal Code for the Kingdom of Siam (Draft Version) 1908), *archived at* http://perma.cc/D99K-8QH6; *Thailand's King Pardons Swiss Man*, *supra* note 3.

13. Streckfuss, *supra* note 1, at 472.

14. Streckfuss, *supra* note 1, at 453 n.13.

15. Streckfuss, *supra* note 1, at 453 n.13.

16. Streckfuss, *supra* note 1, at 453 n.13.

17. Streckfuss, *supra* note 1, at 453 n.13.

18. Streckfuss, *supra* note 1, at 453 n.13.

19. Streckfuss, *supra* note 1, at 453 n.13. At least one commentator and advisor to the present Thai King believed that this decision would have gone the other way in today's Thai courts. Streckfuss, *supra* note 1, at 453 n.13.

of a nuance that favored the defendant over the long arm of Thai lèse-majesté law.

The strength of the monarchy was jeopardized in 1932 when the Thai monarchy experienced an overthrow it barely survived.[20] But with the help of military matrons, it was able to undergo revitalization in the late 1950s, and the king "was able to emerge as perhaps the most enduring actor within Thai politics."[21] The Criminal Code's revision in 1957 has made lèse-majesté not just a crime against the representation of the monarchy, but an offense of national security, and with then-prime minister Sarit Thanarat's[22] assistance (and similar assistance and loyalty of successive military dominated governments), lèse-majesté law has gained much significance. Contemporaneously, it has become a method of political and cultural subversion.[23]

B. Lèse-Majesté in the News and Political Speech

Kosai Mungjaroen was one of the first victims of lèse-majesté subversion after the crime was deemed a national security offence.[24] He was speaking in July 1957 to a crowd of 200 at Sanam Luang, claiming to fairly report the news, and was arrested for lèse-majesté after mentioning the king.[25] He uttered that "the younger brother killed the older brother in order to seize the throne; playing with a gun caused the accident; and King Rama IX will abdicate in favor of his son and run in the elections."[26] The prosecution argued that the wording was an insult to the king.[27] The court agreed, pronouncing such words as "intentional" and "sought to bring discredit to the power, reputation, and honor of the king, in his revered position among the Thai people and as a result the king may become a subject of insult and hate among the people."[28]

The punishment for a lèse-majesté offence in Thailand today, not less

---

20. *See* Streckfuss, *supra* note 1, at 446.

21. Streckfuss, *supra* note 1, at 446.

22. "The Thai army officer and Prime Minister Sarit Thanarat (1908-1963) overthrew the government of Phibun Songkhram in 1957 and was responsible for initiating major programs of economic development and social welfare." *Encyclopedia of World Biography on Sarit Thanarat*, BOOK RAGS, http://www.bookrags.com/biography/sarit-thanarat/ (last visited Nov. 17, 2013, *archived at* http://perma.cc/RX4M-WA58).

23. Streckfuss, *supra* note 1, at 472.

24. Streckfuss, *supra* note 1, at 453; *see also* Peter Leyland, *The Struggle for Freedom of Expression in Thailand: Media Moguls, the King, Citizen Politics and the Law*, 2 J. MEDIA L. 115, 127 (2010).

25. Streckfuss, *supra* note 1, at 454.

26. Streckfuss, *supra* note 1, at 454. (quoting Decision 51/2503 PKSD 2503 dau. 73, 73-78 (1960) (Thai.)) (internal quotation marks omitted).

27. Streckfuss, *supra* note 1, at 454.

28. Streckfuss, *supra* note 1, at 454.

than three and not more than fifteen years' imprisonment, was set in 1976.[29] Not only is the penalty arguably grievous in relation to the actual harm produced, but the possibility of a charge can surface for trivial, irreconcilable events. One example of this is the incident involving the *Thai Rat*.[30] On December 12 of 1976, the Thai newspaper *Thai Rat* showed a picture of the crown prince's fiancée singing a song called "The Lao Moon" while standing between two Thai princesses who were playing instruments to compliment the singing.[31] The celebration was of students soliciting money for a royal organization called the Sai Jai Thai Foundation.[32] The next day, in a different part of the newspaper, there was a picture of a seemingly foreign woman feeding a dog next to a Lao musical instrument called a khaen.[33] Days later, a group of locals contacted the police and pressed charges for lèse-majesté.[34] Apparently, these individuals felt the picture compared the recent picture of the princesses to the dog in the newer picture, that it was a slanderous comparison between the crown prince's fiancée and the canine.[35] The official charge, made by a pre-established group representing the village, claimed the symbolic comparison would "cause the people who read it to understand negatively about the institution of the monarchy."[36] Thankfully, such a wild claim was not accepted by the police, but it gained much attention and was a concerning indication of how easily Thai lèse-majesté law can be provoked.[37]

Fast-forwarding to a 1986 provocation, a case surfaced that garnered much attention in the political sphere and among the general public. Wira Musikaphong was a democratic political candidate speaking in front of a Thai crowd in defense of a fellow party member whose stature as a representative of the people was questioned because he was born of a wealthy family in Bangkok.[38] Mr. Musikaphong stated that birth place and

---

29. Streckfuss, *supra* note 1, at 472; CRIM. C. B.E. 2499 (1956), s. 112, *amended by* CRIM. C. (No. 17), B.E. 2547 (2003) (Thai.).

30. Streckfuss, *supra* note 1, at 457.

31. Streckfuss, *supra* note 1, at 457. In a similar incident: a Frenchman refused to turn off his reading light aboard Thai Airways when told that it was disturbing the Thai princess who was sitting in front of him. *Wikileaks: U.S. Ambassador Boyce Offers Lese Majeste Advice*, POLITICAL PRISONERS IN THAILAND (Sept. 3, 2011), https://thaipoliticalprisoners.wordpress.com/2011/09/03/wikileaks-u-s-ambassador-boyce-offers-lese-majeste-advice/, *archived at* http://perma.cc/9TXS-M4AN. His refusal was followed by a derogatory statement directed at the princess and his arrest for lèse-majesté once the flight landed in Bangkok. *Id.* The man was eventually acquitted after writing an apology letter to the king—then deported. *Id.*

32. Streckfuss, *supra* note 1, at 457.

33. Streckfuss, *supra* note 1, at 457.

34. Streckfuss, *supra* note 1, at 457.

35. Streckfuss, *supra* note 1, at 457.

36. Streckfuss, *supra* note 1, at 457.

37. Streckfuss, *supra* note 1, at 457.

38. Streckfuss, *supra* note 1, at 449.

status were poor measures for leadership:

> If I could have chosen myself, why would I have chosen to have been born as a child of rice farmers in Songkhla? . . . If I could have chosen, I'd certainly have chosen to be born in the middle of the royal palace []. Then I would've been *Prince* [] Wira. I wouldn't have had to come out here and stand in the hot sun and speak to you all. At this time, noon, I would have gone into an air-conditioned room, eaten a bit, *lain down* to sleep, and then gotten up at three . . . [but] one can't choose where one is born.

Later that day, in another speech, he restated:

> If I were a prince now, I would not be standing here, speaking, making my throat hoarse and dry. Here it is 6:30. I would be drinking some *intoxicating liquors* to make myself comfortable and happy. Wouldn't that be better than standing here talking and completely tiring out my poor *shin bones*?[39]

An opposition party leader submitted the transcript of the speech to police and suggested the words constituted a lèse-majesté violation.[40] Initially, there were no charges, and the ruckus did not stop the democrats from winning the election.[41] But then, the opposition party pressed the issue to a trial court, and although the lower tribunal held there was no lèse-majesté violation, the appellate and high courts saw otherwise.[42] The prosecution claimed that Wira spoke "with 'the intent of having the people lose their faith and respect' in the monarchy and of 'damag[ing] their royal honor and reputation,' causing the royalty to be 'looked down upon and hated.'"[43] This case illustrates that the political venue is particularly

---

39. Streckfuss, *supra* note 1, at 449-50 (quoting Somchai Jenchaijittarawaanit, *Khadii prawatisaat minphraborom detchaanuphaap: Wiira Mutsikaphong tit khuk phrau' kaanmu'ang!* [A Historic Case of Lèse-Majesté: Wira Mutsikaphong Jailed Because of Politics!] (Krungthep: Samnakngaan phu'a Sawaenghaa Khwaamyuttitham nai Sangkhom, 2531 [1988], 28-29, 35) (alterations added).

40. Streckfuss, *supra* note 1, at 450.

41. Streckfuss, *supra* note 1, at 450.

42. Streckfuss, *supra* note 1, at 460.

43. Streckfuss, *supra* note 1, at 451 (quoting Somchai, *Khadii*, 83, 133-36, 155; *Pramuan khamphiphaaksaa saan diikaa (PKSD) 2531* [Collection of the Decisions of the High Court, 1988] Decision 2354/2531 [1988], pp. 894, 904); *see also Viewing Cable 08BANGKOK3398, Update on Lese Majeste Cases in Thailand*, WIKILEAKS (Nov. 18, 2008, 9:29 AM), http://wikileaks.org/cable/2008/11/08BANGKOK3398.html, *archived at* http://perma.cc/BF8Q-6C6P.

susceptible to lèse-majesté accusations. It is hard to predict that two (likely) unrelated pictures, such as those in the *Thai Rat* case, could lead to a question of blasphemy to the royalty, but easier to do so in a race to gain political power where the competition could draw upon questionable allegiances for electoral advantage.

Public awareness of these cases has compelled publishing parties to take caution when mentioning royalty: many academic and other works "have used euphemisms such as 'establishment' in English or '*sathaban*' (institution) in Thai to indicate who or what was being spoken about, enabling probing if cautious accounts of the palace."[44]

Some legally conscious Thai scholars avoided the custom of using King Bhumibol's full title and called him "king" (kasat) instead.[45] This created the impression of a less revered position for the monarchy, showing a counterproductive element to Thai lèse-majesté law.[46] One scholar claimed that he avoided royal language "in a deliberate attempt to demystify the institution."[47] Apparently some of the distancing from custom is for motives beyond avoiding criminal prosecution.

III. BRIEF HISTORY OF US FIRST AMENDMENT FREEDOMS

A. Groundwork of the Founding Fathers

The history of US First Amendment freedoms is long, rich, and fascinating. For purposes of this Note, only select cases and developments will be highlighted to touch on some of the defining moments, and paint a summarized picture of where the US was and where it is now with freedom of speech and freedom of expression laws deriving from the First Amendment.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[48]

Former US President James Madison introduced the Bill of Rights to the first US Congress, which bill included free speech clauses but with different phraseology.[49] After submitting multiple versions, the clause as it

---

44. *See* Michael K. Connors, *When the Walls Come Crumbling Down: The Monarchy and Thai-style Democracy*, 41 J. CONTEMP. ASIA 657, 659 (2011).

45. *Id.* at 659-60.

46. *Id.* at 660.

47. *Id.*

48. U.S. CONST. amend. I.

49. *See* Jay, *supra* note 7 and accompanying text. Another of Madison's amendments encompassed the rights of assembly and petition: "[t]he people shall not be restrained from

stands today was adopted along with the rest of the Bill of Rights on August 21, 1789.[50]

The Sedition Act of 1798 prohibited criticism of the federal government or the president; specifically, it was illegal to:

> write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either House of the Congress . . . or the President . . . with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.[51]

Interestingly, the Act was never brought before the Supreme Court as inconsistent with the First Amendment.[52] Madison and his fellow Republicans, however, vehemently denounced the Act as unconstitutional and enlarging congressional powers despite some of the inherent principles of the Bill of Rights, namely, free speech and states' rights.[53] Logically, the fire was bound to burn out, though, as "[f]ederal sedition prosecutions disappeared with the expiration of the Sedition Act in 1801, and a few years later the Court held that federal courts had no constitutional authority to punish individuals for common law crimes, including sedition."[54]

B. Paranoia of Communists and the Espionage Act

A recent observation of US Supreme Court cases between the Sedition Act and World War I shows that none of the cases related to the First Amendment dealt directly with the Amendment.[55] It was not until

---

peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances." Jay, *supra* note 7 (quoting Madison Resolution (June 8, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 12 (Helen E. Veit, et al. eds., 1991)).

50. *See* Jay, *supra* note 7, at 791; BARRY ADAMSON, FREEDOM OF RELIGION, THE FIRST AMENDMENT, AND THE SUPREME COURT: HOW THE COURT FLUNKED HISTORY 93 (2008).

51. Sedition Act of 1798, 1 Stat. 596 (1798).

52. *See* Jay, *supra* note 7, at 794.

53. *See* Jay, *supra* note 7, at 795-96.

54. *See* Jay, *supra* note 7, at 803; *see also* H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427, 1434 (1986) ("Americans tested the Act's legitimacy not against legal tradition but against what the text itself seemed to say. How could the Sedition Act be consistent, these doubters asked, with a constitutional command that Congress 'make *no* law . . . *abridging* the freedom of speech, or of the press?' Isn't a person less free to speak, for all practical purposes, if she can be fined or imprisoned if her speech insults the President or suggests that Congress is acting for selfish rather than patriotic goals?").

55. Jay, *supra* note 7, at 803.

1917 and the Espionage Act that the issue of free expression was regularly considered on the bench.[56] The first case in a series involving the Act implicated Charles T. Schenck, general secretary of the Socialist Party, and his wife Elizabeth Baer, who were convicted of violating the Espionage Act for distributing materials to men eligible for the draft.[57] In short, the information condemned the war and condoned membership with the Socialist Party.[58]

The presiding Chief Justice of the Supreme Court, Oliver Holmes, writing for the majority and upholding the conviction, admitted that by themselves, the actions of the defendants were protected by the First Amendment; however, context can be controlling.[59]

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[60]

The mention of "clear and present danger," and the analogy that the most protective free speech provision "would not protect a man in falsely shouting fire in a theatre and causing a panic,"[61] would be seen time and again in US judicial history.[62]

Minnesota's version of the Espionage Act was particularly contentious regarding First Amendment challenges.[63] *Gilbert v. Minnesota* resulted in a loss for First Amendment protections but not without strong dissent by Justice Brandeis—in fact, his dissent focused only on the First Amendment portions of the majority decision.[64] The alleged violation was a man's passionate disagreement with President Wilson's claim that the War would make the United States more democratic.[65] The man in violation of Minnesota's version of the Espionage Act stated:

---

56. *See* Jay, *supra* note 7, at 803, 814, and 830.
57. Schenck v. United States, 249 U.S. 49, 50 (1919).
58. *Id.* at 53.
59. *Id.* at 52.
60. *Id.* (emphasis added).
61. *Id.*
62. Jay, *supra* note 7, at 836.
63. Jay, *supra* note 7, at 860.
64. 254 U.S. 325, 331 (1920).
65. *Id.* at 327.

> Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a good democracy, for Heaven's sake why should we not vote on conscription of men? We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours.[66]

Brandeis found the Act too broad.[67] His reasons were that it held as violators those that civilly advised pursuit in affairs other than the military—for whatever reason.[68] It would make a criminal out of parents, *in the privacy of their own homes*, who advised their children not to enlist in the army.[69] Brandeis found the law stricter than the federal version, abridging freedom of speech and freedom of the press.[70] The Act, he said, "aims to prevent, not acts, but beliefs."[71]

New York's Espionage Act may have been as broad as Minnesota's: the law forbade acts "to 'advocate[]' anarchism or to 'advocate[], advise[], or teach[] the duty, necessity or propriety' of toppling the government by force or by assassination of officials."[72] In *Gitlow v. New York*, the manager of a left wing Socialist newspaper who advocated overthrowing the government through violent means was convicted under the Act and was found guilty by the Federal Supreme Court.[73] The facts showed that despite a call to action in the newspaper, no uprisings resulted from the publication.[74] Justice Sanford, writing for the majority, asserted that First Amendment freedoms are not absolute.[75] They are limited where police powers must protect from dangers to the public welfare, corruption of public morals, and disturbances of the peace.[76] Sanford found that the left wing Socialist press was not in the protected bubble of free speech.[77]

Justice Holmes' dissent, however, foreshadowed the future direction of the law. He used the clear and present danger analysis that he used to overrule First Amendment protection in *Schenck* to disagree with the conviction: "[T]here was no present danger of an attempt to overthrow the

---

66. *Id.*
67. *Id.* at 334-43.
68. *Id.* at 341.
69. *Id.* at 335-36.
70. *Id.* at 341.
71. *Id.* at 335.
72. Jay, *supra* note 7, at 863 (quoting N.Y. PENAL LAW § 161 (1909)).
73. 268 U.S. 652, 657-58 (1925).
74. *Id.* at 656.
75. *Id.* at 666.
76. *Id.* at 667.
77. *Id.* at 668-69.

government by force on the part of the admittedly small minority who shared the defendant's views. . . . [W]hatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration."[78]

Perhaps a bigger issue, however, was the indeterminateness of whether the First Amendment applied to states as well as the federal government.[79] The jury was out on this issue, the majority gave it some mention but was vague on the matter,[80] while Holmes had no doubt that through the Fourteenth Amendment Due Process clause, the First Amendment applied to the several states.[81] Indeed, *Gitlow* marked the last time there was doubt of the applicability of the First Amendment freedoms to the states.[82] In *Near v. Minnesota*, Chief Justice Evans made it clear that "it is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[83]

C. Let's Talk Violence

Despite the "loss" for the First Amendment in *Gitlow*, free speech freedoms would be celebrated and enforced by the Supreme Court in defining ways going forward. In *Fiske v. Kansas*, the Kansas Syndicalism Act "forbidding advocacy of violence as a means of effecting political or industrial change" was invoked to convict a man merely for the preamble of an Industrial Workers of the World document that factually stated the difference in material well-being between employers and employees.[84] The majority opinion denied any advocacy of syndicalism as defined by the statute.[85] This decision was the first to unanimously protect free speech on primarily constitutional grounds.[86]

The issue of inciting violence was contemplated in more micro circumstances too. In *Cantwell v. Connecticut*, a Jehovah's Witness was practicing his religious duties in a predominantly Catholic neighborhood whose residents were offended by recordings played by the young man.[87] The recordings were described as "a general attack on all organized religious systems as instruments of Satan and injurious to man."[88] One

78. *Id*. at 673; *see also* Schenck v. United States, 249 U.S. 49, 52 (1919).
79. Jay, *supra* note 7, at 866.
80. *Gitlow*, 268 U.S. at 666 n.9.
81. *Id.* at 672.
82. Jay, *supra* note 7, at 866.
83. Near v. Minnesota, 283 U.S. 697, 707 (1931).
84. Jay, *supra* note 7, at 873; Fiske v. Kansas, 274 U.S. 380, 383 (1927).
85. *Fiske*, 274 U.S. at 386.
86. Jay, *supra* note 7, at 873.
87. 310 U.S. 296, 301 (1940).
88. *Id.* at 309.

group of potential converts wanted to hit the Jehovah's Witness—but the Witness made a run for it.[89] At trial, he pleaded not intending to insult or incite violence in anyone, so the question was put: "were the words likely to provoke an immediate hostile response? Were the words 'profane, indecent, or abusive remarks directed to the person of the hearer?'"[90] The judge thought not; *Cantwell* clarified that words alone are not necessarily conclusive in determining a clear and present danger, and it consequentially raised the bar for which words would be considered likely to incite violence.[91]

Cantwell, coupled with the slew of cases limiting Communist Party affiliates, seemed to help religious and political minorities most in need of judicial advocacy by adding muscle to the First Amendment. Yet in the years following the Second World War, federal and state governments passed many laws and regulations restricting Communist membership and the outgrowths of such associations.[92] As military tensions between the United States and the former Soviet Union grew, Communists again came under scrutiny.[93]

D. Freedom of Association

One case deriving from Communist affiliation was of Robel, a machinist at a Seattle shipyard, and an open Communist Party member who was convicted under the Internal Security Act's prohibition against members of Communist organizations in defense facilities.[94] Robel should have resigned as a matter of law pursuant to the Secretary of Defense's determination that the shipyard was a defense facility.[95] Chief Justice Warren, alongside the remaining five-member majority, refused to "accept at face value the government's assertion of 'national defense' as a justification for a law that 'cut deeply into the right of association.'"[96] The panel rejected that the man was guilty by association alone—void of any actual threat to the government.[97] Under this law, even someone aloof to illegal underpinnings of his or her political organizations could be prosecuted.[98] Consistent with such judicial advocacy, the Warren court continued to strengthen the First Amendment's protection of associative

89. *Id.*
90. Jay, *supra* note 7, at 884 (quoting *Cantwell*, 310 U.S. at 309).
91. *Cantwell*, 310 U.S. at 310.
92. Jay, *supra* note 7, at 920-21.
93. Jay, *supra* note 7, at 921.
94. U.S. v. Robel, 389 U.S. 258, 260, 265 n.10 (1967).
95. *Id.* at 260.
96. Jay, *supra* note 7, at 954-55 (quoting *Robel*, 389 U.S. at 264).
97. *Robel*, 389 U.S. at 266-268.
98. *Id.* at 266.

liberty through the 1960s.[99]

During this time, prosecution of Communists essentially came to a close,[100] but alas, other expressions of association were under attack. Starting with (among others) the 1963 case of *Edwards v. South Carolina*, the civil rights movement was facing allegations of illegality relating to expression and association.[101] In Edwards, members of a black church legally rallied to a public place and bore signs and chanted to denounce black segregation.[102] Everything they were doing, the police agreed, was lawful.[103] There was no incitement of any kind or anything that would have insulted passers-by.[104] However, after some time, the police ordered them all to leave in fifteen minutes or there would be arrests based on state disturbance of peace statutes.[105] The church members did not leave and mass arrests were made and fines given.[106] The Supreme Court, ripe with free speech advocacy, reversed every last conviction.[107] Justice Stewart proclaimed the First Amendment did "not permit a State to make criminal the peaceful expression of unpopular views."[108] He continued:

> The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. . . . They peaceably assembled at the site of the State Government and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina."[109]

This strong language was arguably influential not only for development of First Amendment rights, but for the subsequent civil rights movement in the United States.

E. Whose Side are You On? NAACP v. Claiborne Hardware

Displays of pacifistic protest were also protected by courts that wielded the First Amendment as the sword to slay impediments to anti-war expression.[110] But, turning back to race issues, there stands out a case whose

---

99. Jay, *supra* note 7, at 955.
100. Jay, *supra* note 7, at 956.
101. 372 U.S. 229, 233 (1963).
102. *Id.* at 230.
103. *Id*. at 231 n.3.
104. *Id*. at 231.
105. *Id*. at 233.
106. *Id*. at 233-34.
107. *Id.* at 237-38.
108. *Id.* at 237.
109. *Id*. at 235.
110. *See, e.g.*, Hess v. State, 297 N.E.2d 413, 428 (Ind. 1973). Students at Indiana

racial intricacies marked a defining moment for just how the First Amendment protects Americans. In *NAACP v. Claiborne Hardware*, the NAACP ran a boycott against white merchants, whom they thought were racist, as a means to instill racial justice.[111] Individuals were placed near these stores to catch blacks that entered them, and in several instances the blacks were then ostracized and victimized by violence (by other blacks) during the first year of the boycott.[112] The merchants sued, claiming an illegal conspiracy to harm their businesses, and won at trial.[113] The Supreme Court reversed unanimously.[114] It argued a difference between a boycott for economic purposes, as is a labor strike, and boycotting for political motivations.[115] Justice Stevens, in the majority opinion, stated that '"speech concerning public affairs is more than self-expression; it is the essence of self-government."'[116] Despite instances of violence, the Court affirmed the protection of "a [mostly] nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[117] Such questionable tactics, coercive in nature, were deemed legal: "speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."[118]

At this juncture in US First Amendment history, the Supreme Court had nullified unwarranted paranoia against political affiliation, even in times of looming nuclear war.[119] They had allowed public displays of protest against the social state of the country—despite police discretion.[120] They had upheld free speech even in instances of possible economic stagnation caused by coercion, embarrassment, and ridicule.[121] This is how the First Amendment established its prowess in US judicial history.

University were blocking the entrance of a school building to protest war. *Id.* Police started making arrests when one man shouted, "We'll take the fucking street later" or "We'll take the fucking street again." *Id.* He was arrested and charged a nominal fine of one dollar. *Id.* The court reversed the conviction because of lack of immediacy. *Id.*

111. 458 U.S. 886, 887 (1982).
112. *Id.* at 887, 903-04.
113. *Id.* at 893.
114. *Id.* at 934.
115. *Id.* at 913.
116. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).
117. *Id*. at 914.
118. *Id.* at 1002.
119. *See generally Robel*, 389 U.S. at 266-268.
120. Edwards v. South Carolina, 372 U.S. 229, 235 (1963).
121. *See generally Claiborne*, 458 U.S. 886.

IV. THAI LÈSE-MAJESTÉ LAW TODAY

A. Recent Statistics and Constitutional Lèse-Majesté

For purposes of this Note, Thai lèse-majesté law "today" refers roughly to the last twenty years, or from 1993 to the writing of this Note. Although human civilization has departed from monarchies towards democratic principles, Thai lèse-majesté law has shown an increased subversion of the people and an amplification of royal dominance and superiority: there has been an average of five cases per year between 1992 and 2004, with 231 lèse-majesté cases tried in 2006 and 2008.[122] Reports indicate a whopping 3,000 cases were investigated in 2009 alone.[123]

This police power comes partly from the Thai Constitution, last revised in 2007, which establishes the supremacy of the monarchy: "The King shall be enthroned in a position of revered worship and shall not be violated. No person shall expose the King to any sort of accusation or action."[124] However, the document avers a democratic system with the people seemingly at the same level as the monarchy for purposes of the law: "Thailand adopts a democratic regime of government with the King as Head of State. . . . The sovereign power belongs to the Thai people."[125] There is also a provision on free speech protections: "A person shall enjoy the liberty to express his opinion, make speech, write, print, publicize, and make expression by other means."[126] Nonetheless, the royal exception, or rather, the "national security" exception of lèse-majesté and related provisions, quickly limit the freedoms of expression in the same section:

> The restriction on liberty under paragraph one shall not be imposed except by virtue of the law specifically enacted for the purpose of maintaining the security of State, protecting the rights, liberties, dignity, reputation, family or privacy rights of other persons, maintaining public order or good morals or preventing or halting the deterioration of the

122. Connors, *supra* note 44, at 662.

123. Connors, *supra* note 44, at 662.

124. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), s. 8, *archived at* http://perma.cc/RK2P-3GQ7.

125. *Id.*, s. 2-3. One commentator has concluded that this provision is more or less a joke, and that the Thai people have never been the sovereign despite this claim and others: "It is necessary to state the obvious: in Thailand 'the people' have never been sovereign. Any pretentions to the contrary have regularly ended when the tanks once again roll out onto the streets." DAVID STRECKFUSS, TRUTH ON TRIAL IN THAILAND: DEFAMATION, TREASON, AND LÈSE-MAJESTÉ 296 (2011).

126. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), s. 45, *archived at* http://perma.cc/KAQ6-68XC.

mind or health of the public.[127]

B. Arresting Your Reflection—the Sawasdi Amornivat Case

Lèse-majesté law's national security purpose would lend the outside observer, or even Thai residents, to presume that those employed by the State for national security and public safety purposes would enjoy some degree of special protection from the law—that may not be so. There is perhaps no case better than that of Police General Sawasdi Amornvivat to illustrate the reaches of absurdity and arbitrariness that lèse-majesté law (especially in a world with increasing media forms, including cross-national media) creates.[128]

In August of 1993, Amornvivat, serving as chief of Thailand's Police Department and Print Officer, banned an issue of the Honolulu Advertiser in which one article allegedly insulted the Queen.[129] Naturally, the banning order was published, along with the insulting portions of the article, in the Royal Gazette of Thailand, the government's official periodical.[130] Later, a lawyer asked the police to investigate the chief's actions because re-publishing the insulting portions in the Gazette was a lèse-majesté violation itself.[131] The lawyer alleged that the *reporting* of the original violation of lèse-majesté was "instrumental in spreading the story damaging to the Royal Family."[132] The king, trying to stop the nonsense, stepped in and pardoned the chief after the Interior Minister Chavalit Yongchaiyut dismissed the chief.[133] The Minister, however, nullified the *king's* pardon since that could, as a matter of procedure, only be effective after a guilty finding.[134]

Later, another party, Police Lieutenant-General Supas Chiraphan, accused the Interior Minister of lèse-majesté because "to brush aside a royal pardon is an act of lese-majeste."[135] *Then*, another policeman accused the chief of leaking an article in the Daily Ex-press, a British periodical, that suggested the prince or princess could succeed the king (apparently, such

127. *Id.*

128. Streckfuss, *supra* note 1, at 461.

129. Streckfuss, *supra* note 1, at 461.

130. Streckfuss, *supra* note 1, at 461.

131. Streckfuss, *supra* note 1, at 461; *see also Thai Facebookers Get a New Royal Warning*, THAILAND FLOODING 2011 (Nov. 26, 2011), http://thailandflooding.blogspot.com/2011/11/thai-facebookers-get-new-royal-warning.html, *archived at* http://perma.cc/7LQR-DWE2.

132. Streckfuss, *supra* note 1, at 461.

133. Streckfuss, *supra* note 1, at 461.

134. Streckfuss, *supra* note 1, at 461.

135. Streckfuss, *supra* note 1, at 461 (quoting Bangkok Post Weekly Review, November 5 and 12, December 10, 1993; Bangkok Post, October 21, 26, 27, and December 4 and 7, 1993; Nation, October 15, 1993).

speculation was sufficiently insulting).[136] At this point in the debacle, with the investigations of charges pending, Supas Chiraphan remarked tongue-in-cheek, "will the investigators have to refer to the offending remarks in concluding their investigation report? If so, will this also be considered lese-majeste?"[137] In total, although the king again stepped in to deny any offense taken starting from the first incident, Sawasdi and five other officers were issued arrest warrants.[138] As a sigh of relief regarding this whole incident, all charges were dismissed on a technicality: the Gazette was a "state publishing arm" and had "no publisher," and since only published insults could be disciplined, the parties involved were not liable.[139]

This case was an embarrassing string of finger-pointing, essentially mocking the very law designed to mitigate mockery or challenges to the monarchy especially because the king's impositions were essentially negated and ignored. Arguably, this case raised eyebrows as to who really benefits from such law: the royalty, or politicians and other State officials who keep civilian behavior—and their own—in check?

Indeed, academics such as Giles Ji Ungphakorn have challenged the law, presuming political rather than monarchical supremacy as the force of the law.[140] At the Eight International Thai Studies Conference of 2002 in the city of Nakhon Phanom, he expressed a preference for a republic rather than the status quo pseudo monarchical-democratic system.[141] Though heard by 300 people in what was arguably a violation of the easily provoked law, no action was taken against Ungphakorn.[142] Nevertheless, as he became a more popular activist and member of the red-shirt movement in 2008, he was charged with lèse-majesté for his book "A Coup for the Rich."[143] Ungphakorn is now in exile and therefore not constrained by the

---

136. Streckfuss, *supra* note 1, at 461.

137. Streckfuss, *supra* note 1, at 461 (quoting Bangkok Post Weekly Review, November 5 and 12, December 10, 1993; Bangkok Post, October 21, 26, 27, and December 4 and 7, 1993; Nation, October 15, 1993).

138. Streckfuss, *supra* note 1, at 461-62.

139. Streckfuss, *supra* note 1, at 462.

140. Connors, *supra* note 44, at 660.

141. Connors, *supra* note 44, at 660.

142. Connors, *supra* note 44, at 660.

143. Connors, *supra* note 44, at 660; *see also A Coup for the Rich: Thailand's Political Crisis, 2007*, WIKILEAKS (Jan. 19, 2009), http://wikileaks.org/wiki/A_Coup_for_the_Rich:_Thailand's_Political_Crisis,_2007, *archived at* http://perma.cc/US4U-9BNW ("The book criticizes the 2006 military coup and the liberals who supported the coup. It discusses the role of the Thai Monarchy, citing the work of Paul Handley, *The King Never Smiles*. There is a chapter on the politics of the People's Movement. The final chapter deals with the crisis in the South of the Thailand."). Evidently, affiliation with the "other side" of the political spectrum—being part of the "yellow-shirt" movement—is no safeguard to lèse-majesté law: in October 2013, Sondhi Limthongkul, a *founder* of the royalist "yellow-shirt" movement was sentenced to two years "for quoting remarks made by an anti-establishment activist to a crowd at a protest in 2008."

relentless forbiddance of political criticism in his native Thailand.[144] His main academic position regarding such issues is that the military is the real power behind the throne.[145] Perhaps Ungphakorn is best described as a living example of how academic criticism, if outside the mainstream, can dodge criminal prosecution, at least temporarily.

C. Uncle SMS and Lèse-Majesté in Technology

More recently, Thai lèse-majesté law has kept pace with the innovative ways by which citizens worldwide have expressed concern and opposition to despotic or near-despotic rule.[146] Despite hopes of the repeal of an outdated and suppressive law, the current military junta has and the previous government of Prime Minister Yingluck Shinawatra had kept Thai lèse-majesté law on the books.[147] Inspired by the sea of technologically supported uprisings in Tunisia and Egypt, human rights defenders, activists, and journalists in Thailand have used technology and more traditional means of protest to voice concerns of lèse-majesté law.[148] These protests include everything from internet postings to text messages.

A sixty-one year-old man, Ampon Tangnoppakul, allegedly sent four text messages to a government official about the Thai monarchy.[149] The ill-advised texts were deemed offensive and the elder was sentenced to twenty years in prison. Dubbed "Uncle SMS," Tangnoppakul "denied all charges, claiming that he did not even know how to send a text message." [150] Sadly, he died soon after his conviction in a Bangkok prison hospital.[151] His death

---

Thanyarat Doksone, *Thai Royalist Sentenced for Repeating Royal Insult*, YAHOO! NEWS (Oct. 2, 2013, 1:04 AM), http://news.yahoo.com/thai-royalist-sentenced-repeating-royal-insult-050405844.html, *archived at* http://perma.cc/5QRT-4SMU. Sondhi intended to help prosecute the activist and protect the establishment's honor; however, like in the Amornvivat case, Sondhi was a victim of the boomeranging effect of Thailand's oft pragmatically absurd lèse-majesté law. *See id.*

144. Connors, *supra* note 44, at 660.

145. Connors, *supra* note 44, at 660. More recently, Ungphakorn's foreshadowing was perhaps vindicated as the Thai military took control of the government and now rules by a military junta. Catherine E. Shoichet, *Thailand Coup: A Cheat Sheet to Get You Up to Speed*, CNN (May 23, 2014), http://www.cnn.com/2014/05/21/world/asia/thailand-crisis-up-to-speed/, *archived at* http://perma.cc/LEL7-MUUG. Recent political changes began with mass organized rallies against the former Yingluck Shinawatra government. *Id*. Eventually, because of the ongoing protests, the military executed a coup d'état which then established the junta. *Id*.

146. *See* AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2012: THE STATE OF THE WORLD'S HUMAN RIGHTS 22-23 (2012).

147. *Id.*

148. *Id.* at 22.

149. *An Inconvenient Death: A Sad Story of Bad Law, Absurd Sentences and Political Expediency*, ECONOMIST (May 12, 2012), http://www.economist.com/node/21554585, *archived at* http://perma.cc/K3RK-HMYM.

150. *Id.*

151. *Id.*

made national news and likely provoked shock and disappointment among many.[152] One reason behind the shock was that the aforementioned Prime Minister partly gained power because of "red shirt" activists who supported her brother, *former* Prime Minister Thaksin Shinawatra who was exiled for lèse-majesté violations, and therefore supported her as a matter of loyalty.[153]

D. The King's Speech

These internal political contradictions regarding lèse-majesté law were culminated by the words of the current king, His Majesty King Bhumibol Adulyadej, during his official birthday speech in 2005. Following up Thaksin Shinawatra, and holding the attention of much of the whole country, he made shocking remarks that implicated enforcement of lèse-majesté law and the freedom of the Thai people to criticize the monarchy. Here is a portion of the speech:

> It is normal that everyone likes compliments and does not like to be criticised. . . . People who are in the open are normally seen more and are criticised more because of more public exposure. . . . If people feel that they are criticised and show that they are upset for being criticised, there will be damage and there will be turmoil in society. . . .
>
> [T]here are people who said that I am not good, the King is not good and did wrong, but . . . under the Constitutional Monarchy . . . the King can do no wrong. . . .
>
> [T]here are textbooks that always claim . . . how the King can do no wrong. . . . [But] that the King can do no wrong is very much an insult to the King, . . . because this shows that they regard that the King is not human. But the King *can* do wrong.[154]

---

152. *Id.*

153. *Id.*; *see also* STRECKFUSS, *supra* note 125, at 3 ("The coup, which overthrew the democratically-elected government of then prime minister, Thaksin Shinawatra, helped solidify two opposing groups—the 'yellow shirts' (the People's Alliance for Democracy, or PAD, supporters of the monarchy, the military, and a limited democracy) and the red-shirts (anti-coup, pro-the United Front for Democracy against Dictatorship, or UDD, mostly Thaksin supporters). The backdrop to recent political events in Thailand—the protests against Thaksin in early 2006, the coup in September of that year, and the division in Thai society made so strikingly evident as society squared off into yellow and red—was the monarchy and the curious lèse-majesté law protecting it.").

154. His Majesty King Bhumibol Adulyadej of Thailand, The King's 78th Birthday Address (Dec. 4, 2005) (emphasis added), *archived at* http://perma.cc/D2QJ-5N6B

What is irreconcilable about this speech, which went on about the need for criticizing the monarchy,[155] is that lèse-majesté charges steadily continued after it, and do not seem to be slowing down anytime soon.[156] It remains to be seen what will happen when King Bhumibol is succeeded, and how the new ruler will stand on the issue of criticism of the monarchy.

Between a case showing the potential absurdity of Thai lèse-majesté law,[157] continuing difficulties of academics to properly analyze and assess the implications of the law,[158] and a call to encourage criticism of the king made by the king himself,[159] Thailand has seen interesting developments of its free speech laws in the last twenty years. Unfortunately, the biggest problem, that such a draconian law is still at play and long incarcerating people for expressing opinion, is still intact.

V. US FIRST AMENDMENT FREEDOMS TODAY

A. Express as You Please—Village of Skokie and Texas v. Johnson

The end of the civil rights era and the inertial cases thereafter opened a new chapter for the judicial and societal development and understanding of First Amendment freedoms. It marked, for some, a striking embrace of easily offensive and sometimes dark viewpoints to the great emotional burden of American communities.[160] Adopters of these viewpoints were granted their liberty, however, riding the notion that the First Amendment allows expression regardless of its offensive nature.[161] This chapter saw the vindication of a torched American flag[162] and the Supreme Court's first decree of internet openness.[163] The last decade or so has been particularly fruitful for First Amendment developments because of a game-changing political campaign contribution decision,[164] anti-income-inequality uprisings,[165] and the bold practices of a church that is arguably dancing on the fine line between earnest expression of matters of public concern and

---

[hereinafter Birthday Speech].

155. *Id.*

156. Pitman & Tunsarawuth, *supra* note 4; *see also* STRECKFUSS, *supra* note 125, at 6 (noting that there have been "court actions on 765 cases between 2006 and 2009—an average of almost 191 per year—an increase over the immediate previous decade when there was of an average of just five new cases per year").

157. Streckfuss, *supra* note 1, at 461-62.

158. *See* Connors, *supra* note 44 and accompanying text.

159. Birthday Speech, *supra* note 154.

160. *See generally infra* notes 167-174, 212-235 and Part V.D.

161. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

162. *See infra* notes 175-80 and accompanying text.

163. *See infra* notes 191-94 and accompanying text.

164. *See infra* Part V.C.

165. *See infra* notes 181-90 and accompanying text.

abuse of free speech.[166]

Earnest expression in the United States can take forms exalting some of the most tragic events in human history. In *Village of Skokie v. National Socialist Party of America*, a group advocating for the philosophies of the German Nazi Party, the National Socialist Party of America, was sued for planning a march through the village of Skokie, Illinois.[167] There, 40,500 of 70,000 inhabitants were of Jewish religion or ancestry, of which 5,000 to 7,000 were survivors of Nazi concentration camps.[168] The Skokie Park District required $350,000 as a liability deposit for the Party's use of village parks, so the Party gave notice of a demonstration through the village to protest the insurance requirements.[169] The village moved to enjoin the demonstration arguing that Nazi symbols, particularly the swastika, would provoke a violent reaction by villagers.[170] The Supreme Court did sympathize with the villagers: "We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display."[171] Nevertheless, they held that displaying the swastika was a symbolic form of free speech entitled to First Amendment protections.[172] It was insufficient that the display *may* provoke a violent reaction for otherwise peaceful demonstrations to be denied.[173]

Skokie spoke volumes to how far American legal system will go to maintain the inalienable right to express a viewpoint. There is always a difference of opinions to public matters. The Court here only clarified that the degree of opposition to opinions, no matter how deep the cut, is negligible *vis a vis* the freedom to stand on personal or group convictions.[174]

Convictions need not be projected through voice alone. Often, expression takes the form of physical action—like destruction. During the Republican National Convention in Dallas in 1984, demonstrators protested the policies of the Reagan administration and certain corporations.[175] One impassioned demonstrator culminated the backlash by burning the American flag.[176] He was charged under a Texas statute for desecrating a venerated object.[177]

The question before the Supreme Court was whether the burning was

166. *See infra* Part V.C.
167. 373 N.E.2d 21, 22 (Ill. 1978).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 24.
172. *Id.* at 25.
173. *Id.*
174. *Id.* at 24.
175. Texas v. Johnson, 491 U.S. 397, 399 (1989).
176. *Id.*
177. *Id.* at 400.

an "expression" protected by the First Amendment. "We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred."[178] His conduct was found "overtly political . . . both intentional and overwhelmingly apparent."[179] The flag burning had to pass a test that it was a communication, and that it was meaningful and symbolic, rather than a crude defacing of a national symbol.[180] Ironically, the same flag burned by defendant represented a nation that allows such revolt. But how far can revolt go, and can it be done conveniently without interference in public places? Does the Constitution compel the government to minimize resistance during protest, or to offer concessions to make the process easier?

B. Tents and the Internet—Occupy Wall Street and Reno v. ACLU

The Occupy Wall Street movement, a creature of the economic recession and continuing income gap in the United States, has helped answer these questions. What started in Zucotti Park in New York City caught on like wild fire and spread throughout the United States, bringing scores of protestors to public gathering points, demanding reforms to strengthen income equality in the several states.[181] This text marked the start of the uprisings: "WHAT IS OUR DEMAND? #OCCUPYWALLSTREET SEPTEMBER 17TH — BRING TENT."[182] The call to bring tents was all too serious, for as one commentator noted, "to occupy these spaces was to transform them."[183]

The protests themselves were protected by the First Amendment.[184] Their concept is perhaps the paradigmatic embrace of the constitutional right to free speech. Nevertheless, there has been litigation concerning the ambitious, twenty-four-hours-a-day stationing of protestors in public spaces. In *Occupy Fort Myers v. City of Fort Myers*, the district court held that elongated stays of protest were symbolic representations with First Amendment protection.[185] However, reasoned restrictions were allowed: "symbolic expression 'may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to

178. *Id.* at 405.
179. *Id.* at 406.
180. *Id.*
181. Sarah Kuntsler, *The Right to Occupy—Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989, 989 (2010).
182. *Id.* at 990.
183. *Id.* at 992.
184. *Id.* at 1012.
185. 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011).

the suppression of free speech.'"[186] Thus, a city ordinance prohibiting use of tents and other structures for overnight camping was upheld.[187]

Other courts followed suit. In *Occupy Minneapolis v. County of Hennepin*, the court allowed the plaintiff's First Amendment challenges against banning erected structures during Occupy protests in Minnesota.[188] However, invoking *Clark v. Community for Creative Non-Violence*, the court decided that a resolution banning sleeping and erecting tents and other structures on a plaza next to the government center was a valid time, place, and manner restriction.[189] The Occupy movement and the cases following it prove the First Amendment is not boundless. Where one freedom hinders the exercise of potentially many others, judicial pragmatism puts the foot down.[190]

Beyond political or cultural protest, First Amendment freedoms allow access to information, freeing up the universe of ideas on the internet. In *Reno v. American Civil Liberties Union*, the plaintiff challenged the constitutionality of the Communications Decency Act which limited "indecent" and "patently offensive" (*e.g.*, pornographic) material on the internet where it could readily be accessed by people under eighteen years old via easily circumvented age verification.[191] This was the first Supreme Court decision involving cyberspace, and therefore incredibly influential for the myriad of internet cases to come before the tribunal.[192]

The Court affirmed the district court's decision that the limitations placed an unacceptably heavy burden on protected free speech.[193] The decision was based not on the interest of children's free speech, but on adults whose online interactions would be limited, especially with other adults, if such a broad, blanketed restriction were upheld to protect children. *Reno* represented the First Amendment's ability to adapt to an evolving human society. Indeed, because so many people today speak and express through the web, it is axiomatic that the First Amendment apply to the internet.[194]

---

186. *Id.* at 1330 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984)).

187. *Id.* at 1337.

188. 866 F. Supp. 2d 1062, 1069 (2011).

189. *Id.* at 1071; *see generally Clark* 468 U.S. 288 (1984).

190. *See id.* Likewise, in Occupy Columbia v. Haley, the court found that "the Plaintiffs are likely to establish that Occupy Columbia's camping on the State House grounds is expressive conduct, as defined by Spence," but upheld an "emergency regulation" banning camping and sleeping. 866 F. Supp. 2d 545, 557, 563 (2011).

191. 521 U.S. 844, 849 (1997).

192. *Reno v. ACLU (1997)*, INFO PLEASE, http://www.infoplease.com/us/supreme-court/cases/ar33.html (last visited Jan. 13, 2013, *archived at* http://perma.cc/QR3J-2RB4).

193. *Reno*, 521 U.S. at 882.

194. *Id.* at 876.

C. Citizens United

Today, the internet is the new kid on the "development of judicially interpreted free speech" block, but television, particularly on-demand television, has made big noise in the second decade of the new millennium. In the landmark and thickly controversial *Citizens United v. Federal Election Commission*, Citizens United, a non-profit corporation, brought an action to a District of Columbia District Court.[195] Citizens produced and wanted to air a documentary negatively depicting US Senator Hillary Clinton. Citizens was prepared to pay for a slot on video-on-demand to implement the proposal.[196] "It produced two 10-second ads and one 30-second ad for 'Hillary.' Each ad included a short [] statement about Senator Clinton, followed by the name of the movie and the movie's Website address."[197]

Federal law prohibited "corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections."[198] The Bipartisan Campaign Reform Act of 2002 was the statutory equivalent of this law.[199]

Citizens took a proactive approach to the risk of legal sanctions by suing the FEC, seeking declaratory and injunctive relief claiming that airing the video with company funds was constitutionally protected.[200] The FEC's main argument was that government cannot favor particular speech or speakers over others by *not* promoting the others.[201] It cannot take sides, and doing so puts the disfavored speakers at a disadvantage.[202] However, the cases cited for this argument were in the context of free speech restrictions upheld for the proper functioning of governmental entities.[203]

---

195. 130 S. Ct. 876, 886-87 (2010).

196. *Id.* at 887.

197. *Id* (alteration added).

198. *Id.* (citing 2 U.S.C § 441b (2000 ed.))

199. *See id.*

200. *Id.* at 888.

201. *Id.* at 898-99.

202. *Id.* This argument is strengthened because the checks and balances of the US governmental system and Constitution try to protect the voice of the minority (as well as the majority) through neutrality in regards to political advocacy. *See* Christopher Gardner, *Constitutional Balance of Powers Helps Avoid Tyranny of Majority (and Minority)*, MKCREATIVE (July 7, 2010), http://www.mkcreative.net/blog/2010/07/07/constitutional-balance-of-powers-helps-avoid-tyrrany-of-majority-and-minority, *archived at* http://perma.cc/RCE4-2Y2L.

203. *Citizens*, 130 S. Ct. at 899; *see, e.g.*, Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (protected public school education); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) (promoted penological application in the corrections system); Parker v. Levy, 417 U.S. 733 (1974) (ensured the capacity of the US government to

Therefore, the Court was not persuaded.[204] It stated the First Amendment's most urgent application is for political campaign speech.[205] "Political speech does not lose First Amendment protection 'simply because its source is a corporation.'"[206] The holding was simple in scope: no government interest for suppressing political speech of nonprofit and for-profit corporations meets the strict scrutiny standard.[207]

Criticism of *Citizens* came from unexpected places. Conservative Judge Richard Posner told an assembly of foreign educators that unabashed legislators promote the interests of wealthy donors to maintain the stream of cash.[208] He posited that "our political system is pervasively corrupt due to our Supreme Court taking away campaign-contribution restrictions on the basis of the First Amendment."[209]

Perhaps less unexpectedly, but equally vigilant were the remarks of John McCain, a Republican senator from Arizona, who called the ruling the Supreme Court's "worst decision ever."[210] He was appalled that the bench (according to him) equated money to free speech.[211] Indeed, this decision marked a change in the US political landscape. Gaining elected political office, especially in higher positions of power, now necessitates considerably competitive campaign funding—at least much higher than before.[212] Because historically it takes wealth, power, or status to start a competitive political campaign for some offices, *Citizens United* topples the playing field for fair access in effecting political change, a foundational principle of the First Amendment, by *using* the First Amendment itself.

---

discharge its military responsibilities); Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973) (contemplated evaluation of federal military service).

204. *Citizens*, 130 S. Ct. at 899.

205. *Id.* at 898.

206. *Id.* at 900 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

207. *Id.* at 913. To meet the strict scrutiny standard, a law or policy must 1) serve a compelling government interest and 2) be narrowly tailored to advance that interest. Elizabeth S. Anderson, *Integration, Affirmative Action and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1228 (2002). For a thorough analysis of strict scrutiny in US federal courts, see Adam Winkler, *Fatal in Theory and Strict in Fact: an Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

208. James Warren, *Richard Posner Bashes Supreme Court's Citizens United Ruling*, DAILY BEAST (July 14, 2012), http://www.thedailybeast.com/articles/2012/07/14/richard-posner-bashes-supreme-court-s-citizens-united-ruling.html, *archived at* http://perma.cc/ACR8-NTXU.

209. *Id.*

210. Nick Wing, *John McCain: Citizens United is 'Worst Decision Ever' . . . 'Money is Money,' Not Free Speech*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/10/12/john-mccain-citizens-united_n_1960996.html (last updated Oct. 13, 2012, *archived at* http://perma.cc/9DCF-HH3S).

211. *Id.*

212. *The Power of Money: The Ethics of Campaign Finance Reform*, 3 ISSUES IN ETHICS (1990), *archived at* http://perma.cc/K8S8-TLMG. The average congressional campaign costs $1 million, and the average senate campaign costs $4.3 million. *Id.*

D. Westboro Baptist Church

Some efforts at effecting political and social change are bolder than others. The *Snyder v. Phelps* decision concerning the Westboro Baptist Church is proof. The case was on appeal from a jury that held the church's members liable for millions of dollars for picketing near the funeral service of Marine Lance Corporal Matthew Snyder.[213] Westboro's signs used provocative language to express the church's stance against tolerance of homosexuality in America. The church's stances included that deaths of soldiers and other tragedies like 9/11 were god's way of punishing the nation's increasing acceptance of same-sex relationships and sexual activity.[214] The signs read: "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Thank God for Dead Soldiers,' 'Priests Rape Boys,' 'God Hates Fags,' and 'God Hates You,'" among other messages.[215] The Snyders sued for intentional infliction of emotional distress.[216]

The Court reasoned that "the First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[217] The bench emphasized the grave consequences of quieting speech that reflected matters of public interest: less free and robust debate on public issues, mitigating the meaningful dialogue of ideas, and self-censorship in discussing public matters.[218] The prosecution's main argument was that such ugly methods of expression were empty, twisting earnest dialogue about serious public issues through ridicule and unabated attention-seeking for religious interests.[219] The court disagreed.[220] "While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import."[221] Thus, the Court created precedent that no manner of expression is too crude or deemed a publicity stunt in the eyes of the law, if it fits "public import" and other parameters—even if it inflames emotional distress in citizens.[222]

Justice Alito's dissent was remarkable, but perhaps only because it outlined the antithesis of the majority's interpretations of Westboro's

213. Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).
214. *Id.*
215. *Id.*
216. *Id.* at 1214.
217. *Id.* at 1215 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
218. *Id.*
219. *Id.* at 1217.
220. *Id.*
221. *Id.*
222. *Id.* at 1217-18.

methods. His analysis centered on the idea that the substance of Westboro's expressions did not contribute to a meaningful discussion on, *inter alia*, homosexuality.[223] "The First Amendment does not shield utterances that form 'no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[224] He dubbed Westboro's methods "strategy" for garnering attention through provocation.[225] If, in fact, that is the driving force behind Westboro's acts, then Alito's judgment is the right one; however, there has been no evidence that Westboro is not earnest in its ways such as to recant the benefit of the doubt given to them by the Supreme Court.[226]

Snyder was ripe with controversy like *Citizens*.[227] What is more, opponents of this decision have made unlawful threats to the church. Hacktivist[228] group Anonymous apparently hacked Westboro's website in response to its expression methods.[229] The apparent vigilante conduct included posting church members' names, phone numbers, e-mail addresses, and physical addresses online for public viewing.[230] To speculate, this may have been done to physically threaten and perhaps abuse church members.

Government action against Westboro has been urged by more than 300,000 Americans through the White House's online petition system.[231] This petition is the most popular since the website's inception and was started after Westboro vowed to picket the funerals of the Sandy Hook massacre victims.[232] It demanded the White House recognize Westboro as a hate group—something the government has not done to any organization.[233]

---

223. *Id.* at 1222.

224. *Id.* at 1223 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

225. *Id.*

226. *Id.* at 1211.

227. Warren, *supra* note 208.

228. *See* Peter Ludlow, *What is a 'Hacktivist'?*, N.Y. TIMES (Jan. 13, 2013, 8:30 PM), http://opinionator.blogs.nytimes.com/2013/01/13/what-is-a-hacktivist/, *archived at* http://perma.cc/ZBS9-3R3Z.

229. Steven Musil, *Hackers Target Westboro Baptist Church after Newtown Threat*, CNET, http://news.cnet.com/8301-1023_3-57559468-93/hackers-target-westboro-baptist-church-after-newtown-threat/ (last visited Jan. 4, 2013, *archived at* http://perma.cc/RD3J-33AW).

230. *Id.*

231. Kristen A. Lee, *Petition to Label Westboro Baptist Church a 'Hate Group' is Most Popular on White House Website*, N.Y. DAILY NEWS (DEC. 27, 2012, 10:40 AM), http://www.nydailynews.com/news/politics/265k-sign-petition-label-westboro-hate-group-article-1.1228100.

232. *Id.*

233. Mike Hendricks, *Anti-Westboro Petition Has Most Signatures on White House Website,* KANSAS CITY STAR (Dec. 28, 2012), http://www.kansascity.com/2012/12/27/3983779/anti-westboro-petition-sets-new.html,

Because such action would be novel, it is uncertain what it would accomplish.[234] Commentators have suggested that Westboro may lose its status as a tax-exempt organization.[235] The government has yet to give an official response;[236] however, because of the constitutional ruling in *Phelps*, such a request will likely be denied.

From *Skokie* to *Phelps*, the last thirty years or so of developments in US First Amendment freedoms have seen some major qualifications to broaden the scope of speech, and less so, to narrow it. One reason so many otherwise offensive and sometimes questionable forms of speech retain protection is to disallow a slippery slope weakening what are likely the strongest free speech protections worldwide. Through First Amendment jurisprudence, America has retained and advanced its position as the nation most valuing free speech liberties.

VI. RECOMMENDATIONS: HOW EMBRACING US FIRST AMENDMENT VALUES AND LEGAL PRACTICALITY CAN MOVE THAILAND FORWARD

A. A Call for the Repeal of Thai Lèse-Majesté Laws

Thai lèse-majesté law is out of place. Technological advancements are multiplying the channels in which people can express their opinions.[237] Political upheaval by civilians in the Middle East and Africa is driving out despots under the title of the Arab Spring.[238] Now is not the time for censorship of the masses. Thai lèse-majesté law should be repealed.

One would think that the current king's invitation for criticism hinted that now is the time for repeal.[239] It is absurd, moreover, that previous

---

archived at http://perma.cc/73U8-JMNN.

234. *See generally id.*

235. Kiri Blakeley, *Petition Against Westboro Baptist Church May Finally Be Its Downfall*, STIR (Dec. 26, 2012, 1:21 PM), http://thestir.cafemom.com/in_the_news/148675/petition_against_westboro_baptist_church, *archived at* http://perma.cc/UV8G-NWAB.

236. Hendricks, *supra* note 233.

237. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 36-37 (2004) (arguing not only that technological advancements provide more methods of expression, but that they should change our understanding of the social role of expression altogether).

238. *See generally The Arab Spring: A Year of Revolution*, NPR (Dec. 17, 2011, 6:02 PM), http://www.npr.org/2011/12/17/143897126/the-arab-spring-a-year-of-revolution, *archived at* http://perma.cc/8CLY-Y9EY; *see also Tunisia Marks Arab Spring Revolution*, AL JAZEERA, http://www.aljazeera.com/news/africa/2013/01/2013114767673554.html (last modified Jan. 14, 2013, *archived at* http://perma.cc/RY77-A3UU) (noting that Tunisians celebrated the second anniversary of their former leader's exile, and that Tunisia's uprising was the first of the Arab Spring uprisings).

239. Birthday Speech, *supra* note 154; Michael Aquino, *Thailand's Strict "Lèse-Majesté" Laws - The Thai Reverence for the King*, ABOUT.COM, http://goseasia.about.com/od/thaipeopleculture/a/lesemajeste.htm (last visited Nov. 18, 2012,

Prime Minister, Yingluck Shinawatra, had, by maintaining the force of lèse-majesté, suffocated the ideology of the very people that were instrumental in her gaining the seat.[240] Perhaps, as one scholar claimed, the law is less a watch on national security or symbolic protection of the monarchy than an instrument of military control[241]—maybe another reason to be rid of it. Cross-analyzing US free speech decisions with Thai lèse-majesté decisions brings to light some of the holes in the Thai law's rationale.

The "disturbance of the peace" statutes in *Edwards* were supposed to prevent violence in the community.[242] The rallying of the church members, although public, amplified, and perhaps notorious for the surrounding community, did not fit the narrow scope that would "permit [the] State to make criminal the peaceful expression of unpopular views."[243]

The *Mungjaroen* case was similar to *Edwards* because it involved a public gathering with the expression of unpopular views, but it was different because the Thai government thought one man's controversial views of the monarchy were enough to constitute a threat to national security.[244] This Note argues that individual expressions, especially those simply giving a different account of history (here, that the king killed his brother to gain succession of the throne),[245] are not reasonably sufficient to constitute speech which makes the king a subject of hate to the extent of a valid threat to national security. Even if there were a concern that it could start an uprising which in the aggregate *could* be a high-level threat, persistent advocates of such speech should be prosecution instead of those making ineffectual, unfounded reconstructions of monarchical history.

Another parallel can be drawn between political speech in *Musikaphong* and the boycott in the *Claiborne Hardware* case.[246] Mr. Musikaphong's words were merely rhetorical in an arena where rhetoric is essential: political rallying.[247] Moreover, the words were not aimed to bring hate to the royalty, but were used to absolve Musikaphong's colleague of accusations that she came from wealth and therefore would not make a

---

archived at http://perma.cc/AG9U-72BY).

240. *See supra* note 153 and accompanying text.

241. Connors, *supra* note 44; *see also* Otto F. von Feigenblatt, *The Thai Ethnocracy Unravels: A Critical Cultural Analysis of Thailand's Socio-Political Unrest*, 1 J. ALT. PERSP. SOC. SCI. 583, 584 (2009), *archived at* http://perma.cc/JFW7-H4B6 ("Thailand, then known as Siam, remained deeply in the control of Bangkok elites, especially the military forces and the bureaucracy. This intervention by the military was the beginning of the continuing influence of the military in Thai politics.").

242. Edwards v. South Carolina, 372 U.S. 229, 234 (1963).

243. *Id.* at 237.

244. Streckfuss, *supra* note 1, at 454.

245. Streckfuss, *supra* note 1, at 454.

246. NAACP v. Claiborne Hardware, 458 U.S. 886, 887 (1982).

247. John Kane & Haig Patapan, *The Artless Art: Leadership and the Limits of Democratic Rhetoric*, 45 AUSTL. J. POL. SCI. 371, 372 (2010).

suitable political candidate.[248] In *Claiborne Hardware*, the circumstances were much more severe.[249] There, an economic boycott staged to send a strong political message effected violence even within members of the black community.[250] This was a bigger threat to peace, civility, and stable government than the Musikaphong situation; however, the Supreme Court made clear that the essence of self-government was self-expression.[251] As to Thailand, its own constitution harks that the sovereign power belongs to the Thai people.[252] Moreover, the apparent threat to the monarchy in the *Musikaphong* decision was dissected out of context, [253] and speech during political campaigning should not be so harshly deemed to threaten national security when the purpose of speech during an effort to gain the people's votes is to effectuate governmental change.[254]

Arguably, monarchies are distinguishable from governments in a democratic system because their ideal form seems to resist change,[255] whereas a democratic political structure *welcomes* change based on changing national principles, values, and attitudes.[256] Indeed, Thailand and the United States have fundamental legal, social, and cultural differences. The United States is rooted in individualism[257] and personal liberty.[258] The US geo-political structure in which each state operates under its own

248. Streckfuss, *supra* note 1, at 459.

249. *Claiborne*, 458 U.S. at 903-04.

250. *Id.* at 887.

251. *Id.* at 913.

252. CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2550 (2007), s. 3, *archived at* http://perma.cc/ZG7U-RATB.

253. Struckfuss, *supra* note 1, at 449-60.

254. Thailand has voted in favor of the Universal Declaration of Human Rights, which has several provisions asserting freedom of political speech that necessarily advocates change and differing opinion. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/Res/217(III), arts. 18-21 (Dec. 10, 1948). The US Supreme Court has asserted that such speech, dubbed "core political speech," is "interactive communication concerning political change." Meyer v. Grant, 486 U.S. 414, 422 (1988).

255. ANDRZEJ OLECHNOWICZ, THE MONARCHY AND THE BRITISH NATION: 1780 TO THE PRESENT 38 (Andrzej Olechnowicz ed., 2007) (noting generally how and why monarchs resist change); MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 27, 28 (2000) (discussing the importance of succession as a measure of stability and maintenance of the status quo in monarchies and autocracies in particular).

256. *Democracy Education for Iraq — Nine Brief Themes*, STANFORD UNIV., http://www.stanford.edu/~ldiamond/iraq/DemocracyEducation0204.htm (last visited Feb. 24, 2013, *archived at* http://perma.cc/TNE8-CQUU).

257. Claire Andre & Manuel Velasquez, *Creating the Good Society*, 5 ISSUES IN ETHICS (1992), *archived at* http://perma.cc/E2MT-3WQZ (citing ROBERT N. BELLAH ET AL., THE GOOD SOCIETY (New York: Alfred A. Knopf, Inc., 1991)). Americans have long-standing allegiance to individualism. *Id.* This is the belief that Americans can pursue their desires independently of others. *Id.*

258. THE DECLARATION OF INDEPENDENCE paras. 4-5 (U.S. 1776).

constitution, statutes, and government, albeit subject to a federal Constitution and government, makes the value systems throughout the country varied. Thailand has a monarchy, federal executive branch, and provincial and more localized leaders, and the law throughout the land is decided on a federal level.[259] People of the United States have richly diverse religious, political, social, and ideological beliefs.[260] Thailand has a strong collective conscience rooted in Buddhist principles[261] and an unmatched adoration of the monarchy—particularly the king.[262] Yet complete abiding of lèse-majesté laws and continued reverence of the monarchy are not mutually exclusive. The "red shirts" party in Thailand has long been opposed to the law; scholars have come together to urge changes to it,[263] and hundreds of charges and convictions indicate that this country's people are not submitting in complacency to the draconian law. Thai people do not need to be on their knees to love the king and the Kingdom.

State solidarity chants "Long live the King," "God save the Queen," and other wishes for monarchical longevity.[264] When a crown ruler dies (at least in a hereditary monarchy), familial lineage is usually set for transition.[265] Here lies another hurdle for free speech reform in Thailand: unlike potentially drastic differences in political ideologies based on new party leadership in the United States, the monarch as leader of a state, ruling through familial lineage, may not open a dialogue for meaningful change for some time—if at all. However, to be effective, laws preserving the honor of that royal blood should not perplex the governmental agencies that enforce those laws. Likewise, free speech freedoms depend on

---

259. *Thai Governmental Structure*, THAILAND LAW FORUM, http://www.thailawforum.com/articles/briggsgov.html (last visited March 1, 2013, *archived at* http://perma.cc/E4HC-MNNM).

260. *Report: Diversity Growing in Nearly Every State*, NBC NEWS, http://www.nbcnews.com/id/14348539/#.UTzzKRyLZmw (last updated Aug. 17, 2006, 5:12 PM, *archived at* http://perma.cc/4XWA-KPNR).

261. Duncan McCargo, *Buddhism, Democracy and Identity in Thailand*, 11 DEMOCRATIZATION 155, 156 (2004), *archived at* http://perma.cc/UR4G-XSU9.

262. Jonathan Head, *Why Thailand's King is So Revered*, BBC NEWS (Dec. 5, 2007), http://news.bbc.co.uk/2/hi/asia-pacific/7128935.stm, *archived at* http://perma.cc/T6BS-V2SB.

263. Mong Palatino, *Reform the World's Harshest Lèse-Majesté Law*, GLOBALVOICES (Feb. 12, 2012), http://globalvoicesonline.org/2012/02/12/thailand-reform-the-worlds-harshest-lese-majeste-law/, *archived at* http://perma.cc/SFP3-Z2SF.

264. *Long Live the King*, BANGKOK POST (Dec. 5, 2012), http://www.bangkokpost.com/learning/learning-from-news/324686/long-live-the-king, *archived at* http://perma.cc/6LYW-P3XN. After the King's 85th birthday speech and the Thai national anthem, the crowd of 200,000 roared "*Song Phra Chareon*, *Song Phra Chareon*," meaning, "Long live the King." *Id.*

265. *Hereditary Monarchy*, WIKIA, http://micronations.wikia.com/wiki/Hereditary_monarchy (last visited Feb. 12, 2013, *archived at* http://perma.cc/7UW9-Q55R).

governmental bodies such as the judiciary for persistent enforcement. Therefore, whether speech laws are inhibiting or empowering in nature, their effectiveness depends partly on clearly defined practical limitations that serve a governmental or civil purpose.

Lack of such limitations is partly what makes Thai lèse-majesté laws questionable. The *Amornvivat* case showed the practical failure of Thai lèse-majesté law lending to its over breadth and far reach.[266] The same body that gave vitality to the law—the police—was apprehended for lèse-majesté simply because it followed custom in publishing the crime in the official government periodical.[267] Several officers, including the police chief, a lawyer, and the king himself were involved in the convoluted charges.[268] Thai lèse-majesté law in its current form and recent enforcement procedures are counter-productive. Even if they were to restrict publication and other avenues of publicizing its enforcement, it would lose the communicative component of deterrence.

The audacity of the Occupy Wall Street movement was created by the contagion of public awareness in city centers.[269] The public outcry element of First Amendment free speech freedoms rang loud and clear through the nation; however, there were sensible, practical limitations for the movement.[270] No question, the courts could not overrule the right of the American people to rally, but occupation of rally points overnight would impede the same unit that has the power to propel the change protesters demanded, namely, the government.[271] First Amendment freedoms are broad.[272] Any number of public issues can be raised by countless modes of expression without legal consequence.[273] Yet the US judiciary realizes that proper functioning of those freedoms requires limitations aimed at societal stability.[274] Unless Thai lèse-majesté laws are similarly narrowed in scope and applicability—or better yet, repealed—they will produce absurd and counterproductive results like those in *Amornvivat*.[275]

Speech-related laws are further impracticable when enforced upon

---

266. Streckfuss, *supra* note 1, at 461.

267. Streckfuss, *supra* note 1, at 461.

268. Streckfuss, *supra* note 1, at 461-62.

269. Kuntsler, *supra* note 181, at 990.

270. Kuntsler, *supra* note 181, at 992.

271. Kuntsler, *supra* note 181, at 992.

272. Scott F. Uhler & Rinda Y. Allison, *Libraries and the Internet, Part II: Legally Speaking, What is the Internet?*, ILL. PERIODICALS ONLINE, http://www.lib.niu.edu/1998/il980111.html (last visited Feb. 1, 2013, *archived at* http://perma.cc/C5DN-GQQ7).

273. Ken Paulson, *Not Many Exceptions to Free Speech Guarantee*, FIRST AMENDMENT CENTER (Nov. 18, 2011), http://www.firstamendmentcenter.org/not-many-exceptions-to-free-speech-guarantee, *archived at* http://perma.cc/BKN4-HRQW.

274. *See, e.g.*, Kuntsler, *supra* note 181, at 990.

275. Struckfuss, *supra* note 1, at 461.

technological spheres. The case of "Uncle SMS" gave an unsettling and uproarious hint that an unprecedented amount of lèse-majesté charges, spanning phone, internet, TV, and more, could potentially be borne.[276] The accused's claim of not sending those messages,[277] regardless of the claim's veracity, provokes the concern that any Thai person could be wrongfully accused if his or her name is included in a technological medium that insults the monarchy. "Don't leave your Facebook unattended!"[278] Indeed, the Thai government has given a warning that simply "liking" a Facebook post could be means for a lèse-majesté violation.[279]

First Amendment protections are properly secured against technological limitations as seen in *Reno*.[280] Child protection laws are some of the strictest in the United States, often limiting free speech despite First Amendment freedoms.[281] But *Reno* exemplified that legal strongholds on communication mediums of such vast reach are impracticable and would choke the power of the internet and other mediums to proliferate information among people.[282] With more people logging on to the web and sending a text message instead of making a call in Thailand and worldwide, Thai lèse-majesté laws' jurisdiction over the airwaves could mean increased use of police resources for what are often innocuous threats to national security.

B. What Do You Have Left to Say?

The potential repeal of Thai lèse-majesté laws leaves much to question about which laws, if any, should remain to protect the monarchy from legitimate threats of national security due to potentially dangerous speech. It is reasonable for laws controlling physical threats to the monarchy to be in place. Moreover, Thailand has considerably strict defamation laws that apply to all citizens,[283] so the goal of a smooth transition from repeal of the stricter lèse-majesté laws would warrant the

---

276. *An Inconvenient Death*, *supra* note 149.

277. *An Inconvenient Death*, *supra* note 149.

278. This is a reference to the warning given by Facebook users to other users to not leave their Facebook account logged on as to avoid hijacking in the form of embarrassing status updates by hijackers.

279. *Lese Majeste Warning for Facebook*, BANGKOK POST (Nov. 24, 2011, 6:02 PM), http://www.bangkokpost.com/breakingnews/267732/facebook-like-button-may-bring-lese-majeste-charge-against-users, *archived at* http://perma.cc/9Q7V-DBYK.

280. Reno v. ACLU, 521 U.S. 844, 849 (1997).

281. Bill Mears, *Justices: Child Porn Is Not Protected Speech*, CNN, http://www.cnn.com/2008/CRIME/05/19/scotus.porn/index.html (last updated May 19, 2008, *archived at* http://perma.cc/9XQW-T39K).

282. *Reno*, 521 U.S. at 849.

283. CRIM. C., B.E. 2499 (1956), ss. 327-28, *amended by* CRIM. C. (No. 17), B.E. 2547 (2003) (Thai.).

monarchy's protection under the existing defamation laws. Notably, defamation laws enforce jail time of not more than two years instead of the fifteen one could suffer if she insulted the monarchy.[284] The following are two of the provisions of Thai defamation law:

> Whoever, imputing anything the [sic] deceased person before the third person, and that imputation to be likely to impair the reputation of the father, mother, spouse or child of the deceased or to expose that person hated or scammed to be said to commit defamation, and shall be punished as prescribed by Section 326.
> If the offence of defamation be committed by means of publication of a document, drawing, painting, cinematography film, picture or letters made visible by any means, gramophone record or another recording instruments, recording picture or letters, or by broadcasting or spreading picture, or by propagation by any other means, the offender shall be punis hed with imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.[285]

A challenge for this Note's recommendation is that total and instantaneous repeal of lèse-majesté laws may produce a legitimate threat to national security—which is the apparent public policy reason *for* the laws.[286] People who have long inhibited passionate criticism of the monarchy may come together in floods of uproar to demand change. Violence may break out in the streets as police clash with citizens. Again, one recalls the Arab Spring and the violent challenges that accompany marked change in a country's political structure.[287] Therefore, this Note recommends, as a means of sound transition, that a provision be added to current defamation laws specially protecting the monarchy from defamation. This would limit police determinations of a threat to reputation, or false accusations, required for a finding of unlawful speech against the monarchy. This way, for example, scholars could publish legitimate, peer-reviewed work criticizing the monarchy.[288] Respectable criticism with noble

---

284. *Id.*

285. *Id.*

286. The provision on lèse-majesté is listed under the Book II – Title I "Offenses Relating to the Security of the Kingdom.

287. Yoel Guzansky, *The Arab Spring's Violent Turn*, NAT'L INTEREST (Dec. 15, 2011), http://nationalinterest.org/commentary/the-arab-springs-violent-turn-6254, *archived at* http://perma.cc/5PEG-UMU6.

288. For example, academic articles that cite references to the facts that make up arguments would inherently be based on a factual structure, leaving little doubt, holding academic integrity constant, as to whether the points are fallacious such as to invoke

tone would avoid defamation accusations because it would not necessarily be malicious. The antithesis to this proposal is that special treatment for the monarchy in defamation laws may be abused to silence critics just as lèse-majesté laws have; however, repeal of lèse-majesté itself could only happen if the government made a conclusive decision to welcome criticism. Thus, chances of the same free speech abuses would be lessened. Also, the two-year limit of incarceration for defamation, against the possible fifteen years for lèse-majesté, limits the abuse Thai authority could inject into the citizenry's fundamental right to free speech and expression.

This Note encourages further thought and research into the hopeful post-lèse-majesté era in Thailand. With the arguments and case timelines presented in this Note as one possible starting point, ideas should be generated as to how the revered status of the monarchy in Thailand can maintain some justified protection while granting the Thai people a voice to criticize the crown as the current king has welcomed.[289] These ideas should consider factors including, but not limited to: national security, defamation, Buddhism, the Arab Spring, technological advancements, the possibility of a new king in light of the current king's health, and the military and political landscape of Thailand.

VII. CONCLUSION

American abolitionist, Frederick Douglass, once said, "[T]o suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker."[290] This is perhaps the essence of the First Amendment of the US Constitution. It is also probably why the current Thai king welcomed self-criticism, for arguably a benevolent king wants to know how his subjects feel about his rule.[291] Thai lèse-majesté law must go. Thailand is the only nation that still strictly enforces a law that has only ancient appeal.[292] Today, there is robust outcry from the people of the world for more transparency, less fascism and despotism, and more say in governmental decisions.[293] The internet is a beacon for the masses to use the sheer force of numbers to stand up to concentrated political power, and Thailand should not distinguish itself as a muzzle for those that question the power and sway of the monarchy via the internet.

The First Amendment stands in stark contrast to the restrictions imposed by Thai lèse-majesté law, and the values and legal practicality of the application of First Amendment freedoms should serve as a model for a

---

defamation.

289. Birthday Speech, *supra* note 154.

290. Frederick Douglass, A Plea for Free Speech in Boston (1860), *archived at* http://perma.cc/R2C2-ZYD7.

291. Birthday Speech, *supra* note 154.

292. Pitman & Tunsarawuth, *supra* note 4.

293. *See generally The Arab Spring: A Year of Revolution*, *supra* note 238.

shift in Thai free speech laws. Granted, a constitutional monarchy is fundamentally different from a federal presidential constitutional republic,[294] and Thailand cannot be expected to open up to speech of all sorts overnight. However, there is a positive, liberating spirit to the First Amendment, and a disturbing, quieting effect to lèse-majesté laws that beg legal reform when the two are juxtaposed. It is time to silence the silence—Thai lèse-majesté laws ought to be repealed.

294. A constitutional monarchy has a king or queen as the head of state and a parliament to make laws. *What is Constitutional Monarchy*, OFFICIAL WEBSITE OF THE BRITISH MONARCHY, http://www.royal.gov.uk/monarchuk/howthemonarchyworks/whatisconstitutionalmonarchy.aspx (last visited Feb. 24, 2013, *archived at* http://perma.cc/CFX5-ATMC). A constitutional republic's heads of state are the people, represented by a government elected by the people. Mathew Fulton, *What is a Constitutional Republic*, HELIUM, http://www.helium.com/items/1960135-constitutional-republic (last visited Feb. 24, 2013, *archived at* http://perma.cc/L9XM-Q7KJ).

FOREIGN ACCOUNT TAX COMPLIANCE ACT: A STEP IN THE WRONG DIRECTION

Sean Deneault*

"The power of taxing people and their property is essential to the very existence of government." - James Madison[1]

I. INTRODUCTION

Taxes have become the lifeblood of modern society and epitomize the power of the collective over the desires of the individual. When a group of people comes together and joins a society, it surrenders some individual rights and desires for the greater good. For the desires of the collective to be effectuated, there needs to be a physical representation of that collective will. As the physical manifestation of the collective will comes together it requires a collection from the individuals to effectuate the needs of the many, and this is the basis of taxation. However, because the physical manifestation of the collective will requires an individual to sacrifice the fruits of her labor, there is an inherent conflict between the individual and society as a whole.[2] This conflict between the individual and society boils down to basic human nature[3] and is at the root of any discussion regarding tax avoidance.

Tax collection by the government and tax avoidance by citizens are manifestations of the desires of the individual conflicting with the needs of the collective. In the United States, tax avoidance is a zero-sum game[4] between the taxpayer and the United States with the deck stacked heavily in favor of the government.[5] An apt metaphor for the interactions between the

---

* Sean Deneault is a 2014 graduate of Indiana University Robert H. McKinney School of Law. I would like to thank my wife Mindy for her help and support. I would also like to thank the staff of the *Indiana International and Comparative Law Review* for their editing work and helpful suggestions throughout the process.

1. *Selected Tax Quotes*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/Tax-Quotes (last updated Mar. 27, 2013, *archived at* http://perma.cc/J4CY-X9XC).

2. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (Individuals are rational wealth maximizers, and resist being placed into the will of a group unless there is an external force compelling them.).

3. *See id*. (stating that individuals seek out the best result for themselves, and do not concern themselves with a group unless compelled).

4. A "zero-sum game" is a game in which the cumulative winnings equal the cumulative losses. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1376 (10th ed. 1994).

5. The principal tool used by the government is the withholding system in which an employer or other income source withholds a portion of income to be paid to the IRS on the individual's behalf. *Tax Withholding*, INTERNAL REVENUE SERV., http://www.irs.gov/individuals/employees/tax-withholding (last updated Dec. 2, 2013, *archived at* http://perma.cc/84A4-KYF3); *see also* I.R.S. Pub. 505 (2012).

government and taxpayers is a game of poker. In this game, the United States is the "house" or the player with large resources who uses its large resources to cripple the opposing players. The taxpayers' approach to this game will vary based on their individual risk tolerance levels. The less risky players will devise capitulating strategies designed to control their losses, recognizing that the odds are too great for them to attempt anything else. The risk-takers however, will employ elaborate bluff strategies designed to minimize the amount of tax they must pay.

In order to play poker effectively, you are trained to play your opponent, not your cards.[6] And for the past several decades, individuals with the right mix of resources and risk tolerance have recognized a way to beat the house: offshore accounts.[7] Offshore bank accounts designed to conceal assets from the Internal Revenue Service (IRS) have been a thorn in the side of the US tax system for quite some time.[8] To continue the poker metaphor, by "stashing" some money off of the playing table, individuals are able to safeguard their assets by keeping them out of the game altogether. By keeping this money off the table, the taxpayers are bluffing the government, tricking it into believing that the taxpayers are capitulating and merely trying to limit their losses. Individuals have used this method of bluffing effectively, with some estimates claiming between $40 and $70 billion of tax revenue are lost each year.[9]

The US Government has been unable to go after these evaders primarily because of the incompatibility of the domestic taxation system to the international realm.[10] The domestic taxation system, or the game upon the poker table, works because it compels a majority of employers to enter into tax withholding and reporting requirements which force all the chips on the table.[11] In the international realm, withholding systems do not have the same effect,[12] and thus the risk assessment for those with international accounts has not been strong enough to compel compliance.

Over the past several years, the US Government has taken action to close this loophole[13] and force the risk-taking taxpayers to bring all their

---

6. *See generally* DAVID SKLANSKY, THE THEORY OF POKER (1987).

7. *Abusive Tax Schemes*, CARL LEVIN – UNITED STATES SENATOR FOR MICHIGAN, http://www.levin.senate.gov/issues/abusive-tax-schemes (last visited Feb. 20, 2014, *archived at* http://perma.cc/P6TR-EY9S).

8. *Offshore Tax Evasion, Stashing Cash Overseas: Hearing Before the Subcomm. on Finance,* 110th Cong. 3-4 (2007) (statement of Sen. Chuck Grassley).

9. Mike Godfrey, *Senate 'Offshore' Hearing Called 'One-Sided,'* TAX-NEWS (Aug. 3, 2006), http://www.tax-news.com/archive/story/Senate_Offshore_Hearing_Called_OneSided_xxxx24430.html, *archived at* http://perma.cc/DGM7-GEJJ.

10. *See infra* Section II (discussing the development of international tax law).

11. *See Tax Withholding*, *supra* note 5.

12. *See infra* Part IV.

13. 26 U.S.C. §§ 1471-1474 (2010).

assets to the table. A major part of this push to action has been due to the increasing public awareness of the severity of the tax avoidance problem from several high profile events such as the prosecution against the Swiss bank UBS.[14] With $104 million rewarded to whistleblower Bradley Birkenfeld,[15] increased media attention on offshore tax evasion led to a heightened public awareness of its severity.[16] Even the 2012 presidential election was not immune to discussions of offshore tax avoidance, as Mitt Romney was questioned repeatedly about his bank accounts in foreign countries.[17]

Coupled with the increase in media interest, the economic climate has made the idea of closing the loophole political gold. In the middle part of the last decade, Senator Levin and the Committee on Homeland Security and Governmental Affairs have held several hearings regarding tax havens[18] and brought light to the severity of the problem. The often-quoted statistic from these hearings was that the United States loses $100 billion in tax revenue each year.[19] With the federal debt standing more than $17 trillion as

---

14. *See generally* Press Release, US Dep't of Justice Office of Public Affairs, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009, *archived at* http://perma.cc/WW24-66YN); James B. Stewart, *For UBS, a Record of Averting Prosecution*, N.Y. TIMES (July 20, 2012), http://www.nytimes.com/2012/07/21/business/ubss-track-record-of-averting-prosecution-common-sense.html, *archived at* http://perma.cc/8C8E-QPC4; David Voreacos, *Offshore Tax Scorecard: UBS, Credit Suisse, HSBC, Julius Baer*, BLOOMBERG BUSINESSWEEK (Oct. 12, 2011), http:// www.businessweek.com/news/2011-10-12/offshore-tax-scorecard-ubs-credit-suisse-hsbc-julius-baer.html.

15. David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html, *archived at* http://perma.cc/M79V-3XHD.

16. *See* Gretchen Morgenson, *Death of a Loophole, and Swiss Banks Will Mourn*, N.Y. TIMES (Mar. 27, 2010), http://www.nytimes.com/2010/03/28/business/28gret.html, *archived at* http://perma.cc/AW8C-5KGQ. The Birkenfeld case against UBS, when coupled with the Senate Subcommittee hearings conducted by Senator Levin over the past decade, has led to an increase in concern amongst the American public regarding offshore tax evasion, especially after the 2008 financial crisis. *Id.*

17. Joseph Tanfani, *Romney, Obama Trade Jabs over Outsourcing and Offshore Investments*, L.A. TIMES (Oct. 17, 2012), http://articles.latimes.com/2012/oct/17/news/la-pn-presidential-debate-outsourcing-20121017, *archived at* http://perma.cc/NXC6-4S2W; Rachel Weiner, *What Mitt Romney Got from Offshore Investments*, WASHINGTON POST (Oct. 2, 2012), http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/02/what-romney-got-from-offshore-investments/, *archived at* http://perma.cc/HBR4-4EU9; Michael Luo & Mike McIntire, *Offshore Tactics Helped Increase Romneys' Wealth*, N.Y. TIMES (Oct. 1, 2012), http://www.nytimes.com/2012/10/02/us/politics/bains-offshore-strategies-grew-romneys-wealth.html, http://perma.cc/E5QP-6YDC.

18. *Permanent Subcommittee on Investigations*, CARL LEVIN – UNITED STATES SENATOR FOR MICHIGAN, http://www.levin.senate.gov/senate/committees/investigations/ (last visited Feb. 20, 2014, *archived at* http://perma.cc/E8RB-F5Q9).

19. *Id.*; Press Release, Office of Senator Carl Levin, Levin Unveils Stop Tax Haven Abuse Act (July 12, 2011, *archived at* http://perma.cc/5E4-8H3T).

of the publication of this Note,[20] an additional $100 billion in annual revenue is an appealing avenue for politicians to pursue.[21] In addition, many Americans have become increasingly upset with the perceived leniency towards wealthy individuals by the federal government.[22] Between the growing public awareness, difficult economic climate, and the stigma of the "one percent," the political climate was ripe for a change in how the government deals with offshore tax shelters.

The Foreign Account Tax Compliance Act (FATCA) was passed as part of the 2010 Hiring Incentives to Restore Employment Act (HIRE), and added four new sections to Chapter 4 of the Internal Revenue Code.[23] The basic idea of FATCA is to create an information disclosure system for foreign banks to disclose the account information of US clients.[24] To compel banks to enter into this system, FATCA threatens mandatory 30 percent withholding on certain "withholdable payments" made to, or in some circumstances by, financial institutions.[25] These "withholdable payments" include all interest, dividends, and gross proceeds from US sources,[26] so even foreign individuals will be affected, for "as soon as you invest in the US, you are in [the regulation's] scope."[27]

While the decision to implement such a draconian structure is understandable given the background within which FATCA was created,[28] the system itself has some questionable implications. There are potential negative impacts upon the US capital markets and international relations which could have a severe detrimental effect upon the country.

---

20. *The Debt to the Penny and Who Holds It*, TREASURY DIRECT, http://www.treasurydirect.gov/NP/BPDLogin?application=np (last visited Feb. 20, 2014, *archived at* http://perma.cc/RV7A-DRKH) (amount as of Feb. 20, 2014).

21. *See generally* Chales Kadlec, *The Choice of 2012: Obama Austerity vs. Romney Growth,* FORBES (Oct. 8, 2012), http://www.forbes.com/sites/charleskadlec/2012/10/08/the-choice-of-2012-obama-austerity-vs-romney-growth/, *archived at* http://perma.cc/8KG-QC2F; ROBERT CARROLL & GERALD PRANTE, LONG-RUN MACROECONOMIC IMPACT OF INCREASING TAX RATES ON HIGH-INCOME TAXPAYERS IN 2013 (2012), *archived at* http://perma.cc/3SFM-DC55.

22. *See* Damla Ergun, *Among Cliff-Avoidance Options, Most Favor Targeting the Wealthy*, ABC NEWS (Nov. 28, 2012, 7:00 AM), http://abcnews.go.com/blogs/politics/2012/11/among-cliff-avoidance-options-most-favor-targeting-the-wealthy/, *archived at* http://perma.cc/VJ3X-7QLR.

23. Jennifer Wheater, *FATCA and Funds - Where Are We Now?*, 14 BUS. L. INT'L 143, 143 (2012); I.R.S. Notice 2011-53, I.R.B. 2011-32.

24. 26 U.S.C. § 1471 (2010).

25. Wheater, *supra* note 23, at 145.

26. Luisa Porritt, *European Investors Deterred from US Investments by FATCA*, INV. EUR. (June 7, 2011), http://www.investmenteurope.net/investment-europe/news/2076630/european-investors-deterred-investments-fatca, *archived at* http://perma.cc/74J4-DUYS.

27. *Id.* (quoting Georges Bock, head of tax and banking at KPMG Luxembourg).

28. *See infra* Part III (illuminating combination of financial problems).

Furthermore, when the system is examined in conjunction with the individuals it seeks to capture, there arise several concerns as to its potential effectiveness.[29] With the fervor surrounding the role of the upper classes in the 2008 financial crisis, it is important that this system be thoroughly examined and analyzed with a detachment from its political undertones. By taking the system for what it is and working it through to its logical conclusion, we will be able to determine whether its benefits outweigh its costs.

II. ISSUES

1. This Note begins by illustrating the progression of the international tax collection efforts. The first type of effort examined is the use of bilateral tax treaties, which have been the primary means of reigning in offshore tax evasion since World War II. Regarding the second type of effort, the Note examines the recent developments of Organization for Economic Co-operation and Development (OECD) "blacklisting" and multinational pronouncements.

2. Next, the Note examines the development of FATCA, how it works, and what effects should be anticipated.

3. This Note then discusses the domestic voluntary tax compliance system employed by the United States and how FATCA is attempting to replicate such a system for the very different international realm.

4. The Note then turns to the potential negative effects of FATCA on international relations and the US capital and investment markets.

5. Finally the Note argues that due to the overwhelming negative effects of FATCA, and the type of person who still holds offshore accounts, the US Government should instead attempt a more enticing approach to regain some of the lost tax revenue. By using the "carrot" instead of the "stick," the United States will have greater success in gaining back tax revenue lost in overseas accounts.

III. HISTORY/DEVELOPMENT

A. Development of International Tax Collection Efforts Prior to FATCA

FATCA developed as a result of a growing public awareness of the failures of prior international tax collection efforts[30] and a social climate of

29. *See infra* Part V.

30. *See generally* Niels Jense, Note, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland*, 63 VAND. L. REV. 1823 (2010); Beckett G. Cantley, *The UBS Case: The U.S. Attack on Swiss Banking Sovereignty*, 7 B.Y.U. INT'L L. & MGMT. REV.1, 2 (2011); Godfrey, *supra* note 9.

powerful resentment towards wealthy individuals.[31] In order to understand why FATCA developed into such a strenuous regulatory regime,[32] we must begin by examining the previous inadequate attempts to regulate offshore accounts. The foundations of international tax regulation began with bilateral treaties.

1. Bilateral Treaties

US laws on offshore accounts have been around since the post-World War II era[33] but did not focus on tax evasion until much later.[34] Similar to the development of international law in general, the regulation of offshore accounts began with the promulgation of bilateral treaties.[35] By their very nature, bilateral treaties are as effective as the two countries want them to be.[36] The often voluntary nature of bilateral treaty negotiations can lead to a severe limitation in the scope of the treaty's application.

One of the historic problems with the implementation of an international legal structure is the conflict with domestic sovereignty.[37] As separate sovereign entities, when countries negotiate with each other they are often reluctant to surrender any of that sovereignty,[38] even if it effectuates a mutually beneficial outcome.[39] In the realm of international tax avoidance, the element of sovereignty that has caused the greatest problem in effectuating binding obligations is banking privacy law.[40] Banking

---

31. Ergun, *supra* note 22; *see generally* Press Release, Office of Senator Carl Levin, *supra* note 19.

32. *See infra* Part III.

33. *See* 1951 Income Tax Convention, U.S.-Switz., Sept. 27, 1951, 127 U.N.T.S. 227 [hereinafter 1951 Convention].

34. *See* 1996 Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, U.S.-Switz., May 29, 1997, S. Treaty Doc. No. 105-8 [hereinafter 1996 Convention].

35. *See* 1951 Convention, *supra* note 33.

36. Bilateral treaties are treaties between two countries that are negotiated similar to a contract setting in which the terms will be as strict or lenient as the parties agree to. *See Bilateral Treaty Law and Legal Definition*, USLEGAL, http://definitions.uslegal.com/b/bilateral-treaty/ (last visited Feb. 26, 2014, *archived at* http://perma.cc/58J3-CABG).

37. *See generally* Cantley, *supra* note 30; Laura Szarmach, *Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case*, 43 CORNELL INT'L L.J. 409 (2010); Richard A. Martin, *Problems in International Law Enforcement*, 14 FORD. INT'L L.J. 3 (1990).

38. *See* 1951 Convention, *supra* note 33, art. XVI (information disclosure limited to "information available under the respective taxation laws of the contracting States"); 1996 Convention, *supra* note 34, protocol par. 8, art. 26 (article 26 sets forth the information exchange based on "tax fraud" which is defined in paragraph 8 of the protocol to rely on Swiss laws); *see also* Cantley, *supra* note 30, at 14.

39. *See infra* Part IV (discussing prisoner's dilemma situation).

40. Brief of UBS AG in Opposition to the Petition to Enforce the John Doe Summons at

privacy laws vary from country to country, but in general they prevent banks from disclosing information about their customers in all but very limited circumstances.[41] As the basic goal of US tax regulators is to gain information about accounts held by citizens in a foreign country,[42] it is understandable how strong banking privacy laws can severely hinder those attempts. Perhaps the most significant bearings on successful treaties are whether or not the other country is also concerned about offshore tax evasion,[43] and if it is vulnerable to US influence.

Some countries, like the United Kingdom, are so similar to the United States that their domestic interests in preventing tax avoidance are often aligned, yielding an effective treaty.[44] Often containing well-developed economies, these countries utilize similar taxation philosophy,[45] and are also concerned with taxpayers' attempts to avoid taxation.[46] Because these countries are similar to the United States in terms of taxation methods,[47] it follows that they are concerned with tax avoidance themselves, and thus are amenable to entering into more strenuous and effective bilateral treaties.[48] As a result of the similarities between these countries and the United States,[49] their treaties often reflect a shared desire to curb tax avoidance, resulting in effective agreements.[50]

Conversely, there are countries whose domestic interests are often in direct opposition to those of the United States. Some of these countries have found that banking privacy laws[51] benefit their economy.[52] Countries such

---

1-4, United States v. UBS AG, 2009 U.S. Dist. LEXIS 66739 (S.D. Fla. Apr. 30, 2009) (No. 09-20423); Amicus Brief of Government of Switzerland at 11, United States v. UBS AG, 2009 U.S. Dist. LEXIS 66739 (S.D. Fla. Apr. 30, 2009) (No. 09-20423); *see also* Cantley, *supra* note 30.

41. Jense, *supra* note 30, at 1827.

42. Treas. Reg. § 9022-01 (2012).

43. If a country is concerned about offshore tax evasion by its own citizens, it follows that the country will be more likely to be willing to aid another country to rein in tax avoiders.

44. The U.K. income tax rates are quite similar to what we have in the United States and thus have not attracted those trying to evade paying higher taxes. *Income Tax Rates and Allowances*, HM REVENUE & CUSTOMS, http://www.hmrc.gov.uk/rates/it.htm#2 (last visited Feb. 20, 2014, *archived at* http://perma.cc/HT2R-RXFW).

45. *Id.*

46. *See* Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA, U.S.-U.K., Sept. 12, 2012, *archived at* http://perma.cc/S8CF-WALA [hereinafter U.K. FATCA Agreement].

47. *Income Tax Rates and Allowances*, *supra* note 44.

48. U.K. FATCA Agreement, *supra* note 46.

49. *Income Tax Rates and Allowances*, *supra* note 44.

50. U.K. FATCA Agreement, *supra* note 46.

51. Laws such as Switzerland's make it a criminal offense to reveal a client's identity. *Swiss Banking Secrecy: Don't Ask, Won't Tell*, ECONOMIST (Feb. 11, 2012), http://www.economist.com/node/21547229, *archived at* http://perma.cc/CW27-GH78.

52. The Islands, an island country that is only 102 square miles, is the fifth largest

as the Cayman Islands, Isle of Mann, Sri-Lanka, and others have found that by increasing banking secrecy laws and keeping taxes low they are able to attract a great deal of foreign capital.[53] This influx of foreign capital creates a powerful industry that carries significant weight in policy decisions due to the significant impact of the industry upon the country's economy. This gives the politicians of the country little incentive to align their interests with the United States, which would require them to go against their domestic interests.[54] These countries are so reliant upon these capital markets that it is likely that no amount of regulation short of a world-wide multinational taxation system will compel their compliance.[55]

Similar to the countries described in the preceding paragraph, Switzerland also has domestic interests that have historically clashed with the interests of the United States and have led to several inadequate treaties.[56] Because Switzerland is a more significant player on the international stage and has a more storied banking history, it has developed over the years as one of the preeminent offshore tax havens.[57] Because of this, Switzerland is the perfect example to evaluate the development of bilateral treaties between the United States and a country with a strong interest in banking privacy laws.

Swiss banking privacy laws developed in response to the threat of Nazi Germany executing German citizens who did not disclose assets held outside of Germany.[58] The Swiss passed legislation establishing specific duties for bankers and criminalized the disclosure of information in order to protect the national sovereignty of the Swiss economy as well as the assets of bank customers.[59] These strong laws and the country's historical economic stability[60] helped Switzerland become a premier banking center, which to this day remains an important part of its economy.[61]

---

banking center in the world. *Places in the Sun*, ECONOMIST (Feb. 22, 2007), http://www.economist.com/node/8695139, *archived at* http://perma.cc/6ACF-R2DJ.

53. Taking the Cayman Islands as an example: they are the domicile for an estimated 35 percent of the world's hedge funds, the top foreign jurisdiction for US-held asset-backed securities, and they have the highest level of US banking liabilities and second highest level of US banking claims of any foreign jurisdiction as of mid-2007. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-778, CAYMAN ISLANDS BUSINESS AND TAX ADVANTAGES ATTRACT U.S. PERSONS AND ENFORCEMENT CHALLENGES EXIST 7 (2008); *see also Places in the Sun*, *supra* note 52.

54. *Places in the Sun*, *supra* note 52.

55. Through a worldwide taxation reporting system, the assumption is that the international pressure would be overwhelming.

56. Swiss treaties have been rewritten several times to attempt to close the loopholes. Jense, *supra* note 30, at 1851.

57. Jense, *supra* note 30, at 1825.

58. Greg Brabec, *The Fight For Transperancy: International Pressure to Make Swiss Banking Procedures Less Restrictive*, 21 TEMP. INT'L & COMP. L.J. 231, 233 (2007).

59. *Id.* at 234.

60. *Id.* at 238.

61. SWISS BANKING, THE ECONOMIC SIGNIFICANCE OF THE SWISS FINANCIAL CENTRE 3

The post-World War II world marked a turning point in international affairs. After the wars, the development of multinational organizations and technology connected the world more than ever before. In the realm of taxation, the post-war period also made it easier for individuals to hide money in different countries.[62] The recognition of this problem led to the development of the first bilateral tax treaties between the United States and other countries.[63] The 1951 convention between the United States and Switzerland focused mainly on setting up a system that prevented double taxation.[64] While the system set up the exchange of information, it was only for information "as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are subject of the present Convention."[65] Without defining "fraud or the like"[66] and by leaving the specifics of information exchange up in the air,[67] the convention was not constructed to deal with tax evasion as much as it set up a framework for dealing with double taxation.[68]

With the changing tax laws[69] and growing public awareness[70] towards the end of the last century, the treaties began to change.[71] In the case of the treaty between Switzerland and the United States, the treaty has been amended three times since the mid-1990s.[72] The first change resulted in a whole new convention in 1996,[73] followed by 2003 and 2009 agreements, all focusing on remedying the inadequacies of Swiss reporting of accounts held by US citizens.[74]

(2012), *archived at* http://perma.cc/8Z89-B2Q5.

62. *See generally* 1951 Convention, *supra* note 33.

63. 1951 Convention, *supra* note 33.

64. 1951 Convention, *supra* note 33.

65. 1951 Convention, *supra* note 33, art. XVI.

66. 1951 Convention, *supra* note 33, art. XVI.

67. 1951 Convention, *supra* note 33, art. XVI.

68. 1951 Convention, *supra* note 33, art. XVI.

69. The 1986 Amendment of the US Tax Code took away a lot of domestic tax shelter loopholes that were being used by the wealthy to avoid taxes. Calvin Johnson, *What's A Tax Shelter*, 68 TAX NOTES 879, 879 (1995), *archived at* http://perma.cc/AC7Y-J58P ("[T]he Tax Reform Act of 1986 intended to get rid of tax shelters . . . .") (alterations added).

70. The idea of foreign tax shelters was becoming more mainstream, appearing in books and movies. *See, e.g.*, JOHN GRISHAM, THE FIRM (1991) (The Book and subsequent movie focused on a tax attorney who utilized the benefits of the Cayman Islands.).

71. *See e.g.*, 1996 Convention, *supra* note 34.

72. *See* 1996 Convention, *supra* note 34; Mutual Agreement of January 23, 2003, Regarding the Administration of Article 26 of the Swiss-U.S. Income Tax Convention of October 2, 1996, U.S.-Switz., Jan. 23, 2003, *archived at* http://perma.cc/3KFG-W49D [hereinafter 2003 Agreement]; Agreement Between the U.S.A. and Swiss Confederation on the Request for Information from the Internal Revenue Service of the United States of America regarding UBS AG, a corporation established under the laws of the Swiss Confederation, U.S.-Switz., June 18, 2009, *archived at* http://perma.cc/54SA-VH9V [hereinafter 2009 Amendment].

73. 1996 Convention, *supra* note 34.

74. Jense, *supra* note 30, at 1826.

By its terms, the 1996 Convention Between the United States of America and the Swiss Confederation for the Avoidance of Double Taxation [1996 Convention] appeared to be a major step forward,[75] but in practice the treaty's inadequacies became clear.[76] The provisions relating to the exchange of information were praised as expanding the scope of information exchanged by allowing US authorities to access bank information in cases of tax fraud.[77] The protocol of the Convention defines "tax fraud" as "fraudulent conduct that causes or is intended to cause an illegal and substantial reduction in the amount of the tax paid to a Contracting State"[78] as well as acts that "constitute fraudulent conduct under . . . [the] laws or practices" of a contracting state.[79] This dual approach[80] to classifying and reigning in tax evasion may appear effective, but the stringent domestic laws and interpretations of Switzerland[81] led to an inability to effectively reign in US account holders,[82] and prompted the need for future amendments to the treaty.[83]

The 2003 Agreement was put forth to expand upon the exchange of information section of the 1996 Convention and was "intended to facilitate more effective information exchange between the two countries."[84] The 2003 Agreement focused primarily upon fleshing out an effective definition of "tax fraud or the like,"[85] even publishing a set of fourteen "illustrative"

---

75. Jense, *supra* note 30, at 1826.

76. Jense, *supra* note 30, at 1826.

77. Letter of Transmittal from William J. Clinton, Pres. of the United States, to the Senate of the United States (June 25, 1997), *archived at* http://perma.cc/6UEL-4RS9.

78. 1996 Convention, *supra* note 34, protocol, par. 10.

79. 1996 Convention, *supra* note 34, protocol, par. 10 (alteration added).

80. Beckett G. Cantley, *The New Tax Information Exchange Agreement: A Potent Weapon Against U.S. Tax Fraud?*, 4 HOUS. BUS. & TAX L.J. 231, 237 (2004) (citing W. Warren Crowdus, *U.S. Switzerland Sign Income Tax Treaty*, 13 Tax Notes Int'l 1983, 1991-92 (1996)).

81. In Switzerland, tax fraud is defined very narrowly and can be achieved one of two ways: either by using falsified documents (other than the tax return) to deceive, or without those documents, by willfully deceiving to evade taxes. Jense, *supra* note 30, at 1833. Without meeting either of these standards, the conduct will fall short of "tax fraud" under Swiss domestic law, and thus forecloses one of the two-pronged approaches. Jense, *supra* note 30, at 1833. Furthermore, the 1996 Convention provides that no "trade, business, industrial or professional secret" may be disclosed, and because in Switzerland banking privacy is considered a professional secret it does not fall under the second provision either. Jense, *supra* note 30, at 1833. So while the two-pronged approach towards reigning in "tax fraud" appears beneficial, a deeper look shows the problems with the system. Jense, *supra* note 30, at 1833.

82. Jense, *supra* note 30, at 1833.

83. 2003 Agreement, *supra* note 72; 2009 Amendment, *supra* note 72.

84. Press Release, US Dep't of the Treasury, Treasury Announces Mutual Agreement with Switzerland Regarding Tax Information Exchange (Jan. 24, 2003), *archived at* http://perma.cc/8PF3-AMKF.

85. 2003 Agreement, *supra* note 72, par. 4.

hypotheticals.[86] Commentators were optimistic that this agreement would result in a change,[87] heralding the Agreement as "an easing of Swiss banking secrecy laws with respect to fraud committed by US persons."[88]

The optimism regarding the 2003 Agreement's effectiveness did not survive long. In 2008, Bradley Birkenfeld, an American citizen and a director of the United Bank of Switzerland (UBS), pleaded guilty to aiding in the evasion of taxes.[89] At the time, it was estimated that US clients held about $18 to $20 billion in assets at UBS,[90] which is one of the largest financial institutions in the world.[91] Mr. Birkenfeld's startling testimony elaborated the extent to which UBS aided US citizens in evading taxes, such as smuggling diamonds into the United States in a tube of toothpaste.[92] In addition to being subject to the terms of the 2003 Agreement, UBS had also taken the additional step of entering into a Qualified Intermediary (QI) Agreement[93] with the IRS, which required it to identify and document any customers who held US investments or received US source income in their accounts.[94] So when Mr. Birkenfeld testified against UBS, the inability of both the government-mandated requirements from the 2003 Agreement and the further requirements of the voluntary QI Agreements exposed the considerable flaws in the US efforts to reign in offshore accounts in Switzerland.[95] Coinciding with the "great recession," the news of the number of wealthy Americans evading taxes struck a chord with the American public and produced a great deal of animosity.[96]

The UBS debacle revealed that the promising language in the 2003 Agreement still suffered from the debilitating effects of Switzerland's strong banking privacy laws. The main failing elements of the 2003

---

86. 2003 Agreement, *supra* note 72, par. 4.

87. Jense, *supra* note 30, at 1832.

88. Cantley, *supra* note 80, at 253.

89. Lynnley Browning, *Ex-UBS Banker Pleads Guilty in Tax Evasion*, N.Y. TIMES (June 20, 2008), http://www.nytimes.com/2008/06/20/business/20tax.html, *archived at* http://perma.cc/B74E-PX5G.

90. Kocieniewski, *supra* note 15.

91. US SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 2 (2008).

92. Kocieniewski, *supra* note 15.

93. Agreements are entered into with the IRS to "simplify withholding and reporting obligations for payments of income made to an account holder through one or more foreign intermediaries." I.R.S. Rev. Proc. 2000-12 s. 1(01), *archived at* http://perma.cc/6BKH-7TST.

94. STAFF OF THE JOINT COMM. ON TAXATION, TAX COMPLIANCE AND ENFORCEMENT ISSUES WITH RESPECT TO OFFSHORE ACCOUNTS AND ENTITIES 31-33 (2009); *Tax Compliance: Offshore Financial Activity Creates Enforcement Issues for IRS: Testimony Before the Subcomm. on Fin.,* 111th Cong. 1 (2009) (statement of Michael Brostek, Dir. Strategic Issues Team).

95. Jense, *supra* note 30, at 1833.

96. Press Release, Office of Senator Carl Levin, *supra* note 19.

Agreement are that it still excludes tax evasion short of "tax fraud"[97] and requires US officials to find the tax evader and obtain enough evidence to support a "reasonable suspicion" of tax fraud.[98] These inadequacies can be attributed to Switzerland's domestic interest in maintaining its strong banking privacy laws.[99]

In order to address the inadequacies of the 2003 Agreement exposed by the UBS debacle, the United States and Switzerland negotiated a 2009 amendment.[100] This treaty has not been ratified by the US,[101] presumably because the United States has recognized the flaws in using bilateral treaties to rein in tax evasion. The bilateral treaty efforts by the United States in attempting to rein in offshore tax evasion have not been effective when it faces opposition from strong domestic laws such as Switzerland's.[102] These treaties have illustrated the need for compulsory reporting requirements on foreign banks in order to effectively curb tax evasion.[103] Unfortunately for the United States, the framework of international law does not lend itself to compulsory requirements on sovereign nations unless those nations voluntarily comply.[104] Because it will be nearly impossible for all countries to voluntarily comply with the disclosure requirements of the United States,[105] treaties are an inadequate mechanism for dealing with offshore tax evasion.

2. "Blacklisting"

With growing discontent over the ineffectiveness of bilateral treaties

---

97. Jense, *supra* note 30, at 1836-37:

> Even under the 2003 Agreement, tax fraud still excludes simple tax evasion. Without more, tax evasion does not amount to the kind of conduct that may trigger information exchange obligations. A U.S. taxpayer who underreports his income and hides his undeclared funds in a Swiss bank account does not have to fear disclosure to U.S. authorities. He will not come within the ambit of the 2003 Agreement until he fabricates documents, fails to maintain legally required records, hides behind a scheme of sham corporations, or fails to file a tax return altogether.

Jense, *supra* note 30, at 1836-37.

98. Jense, *supra* note 30, at 1837.

99. Jense, *supra* note 30, at 1837.

100. 2009 Amendment, *supra* note 72.

101. Jason Connery et al., *Current Status of U.S. Tax Treaties and International Tax Agreements*, 42 TAX MGMT. INT'L JOURNAL 106, 4 (2013), *archived at* http://perma.cc/M6FT-T6UJ.

102. *See generally* United States v. UBS AG, No. 09-20423, 2009 U.S. Dist. LEXIS 66739 (S.D. Fla. July 7, 2009) (the existence of this case shows the inability of the 2003 Agreement to break through the strong Swiss privacy laws).

103. Jense, *supra* note 30, at 1840.

104. *See generally* Martin, *supra* note 37.

105. *See supra* Part I.A.1.

to address offshore tax evasion,[106] countries such as the United States began to seek out different solutions.[107] One strategy was to use international organizations and multinational political pressure to condemn tax haven countries via "blacklisting."[108] In 2000, the Organization for Economic Cooperation and Development released a list of countries considered to be "uncooperative tax havens."[109] This list contained a total of thirty-eight countries, which included: the Cayman Islands, the Bahamas, Bermuda, Malta, the Isle of Man, and Panama.[110] This "blacklist" was a publicly disseminated list[111] intended to deter investment in those locations,[112] and use international pressure to compel change.[113] Inclusion on the list did prompt action amongst the blacklisted countries, as thirty-one of the thirty-eight countries were removed by 2002, and by 2009 all of the thirty-eight countries were removed from the list.[114]

While the international pressure did instigate a desire to get off the "blacklist"[115] the steps required for de-listing left much to be desired. In order for a country to get off the "blacklist" they were required to "make formal commitments to implement all the OECD's standards of transparency and exchange of information."[116] Using the Cayman Islands as an example, in order to comply with the "formal commitment" requirement, it sent the OECD a letter pledging to refrain from:

> (1) introducing any new regime that would constitute a harmful tax practice under the OECD; (2) for any existing regime related to financial and other services that currently does not constitute a harmful tax practice under the OECD Report, modifying the regime in such a way that, after modifications, it would constitute a harmful tax practice under the OECD Report; and (3) strengthening or

106. One example is the UBS debacle, evidencing the loopholes in the US-Swiss tax treaties, discussed *infra* Part II.A.

107. Press Release, Office of Senator Carl Levin, *supra* note 19; *see generally* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 53.

108. *Jurisdictions Committed to Improving Transparency and Establishing Effective Exchange of Information in Tax Matters*, ORG. FOR ECON. COOPERATION AND DEV., http://www.oecd.org/countries/virginislandsuk/jurisdictionscommittedtoimprovingtransparencyandestablishingeffectiveexchangeofinformationintaxmatters.htm (last visited Feb. 21, 2014, http://perma.cc/T5G-239X).

109. *Id.*

110. *Id.*

111. *Id*.

112. *Id.*

113. These jurisdictions all have low tax rates and strong banking security laws, which make them appealing tax havens. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

> extending the scope of any existing measure that currently constitutes a harmful tax practice under the OECD Report.[117]

These "commitments," even upon first glance, are no more than empty promises. What the Cayman Islands "promises" to do is to not increase its tax avoidance structure.[118] It is not promising to get rid of "harmful tax practices" or commit to reforming them, but just to stop their development or progression. Many of these countries, including the Cayman Islands, already have a developed system of "harmful tax practices"[119] which garnered them a spot on the list in the first place. So by telling these countries just not to go any further, it has almost no practical effect because they are already in a position where they have the practices in place and will gain little from expanding them. Without requiring any change in the currently existing "harmful tax practices," the OECD appears to be doing nothing more than officially listing common knowledge.

Towards the end of the prior decade, it became clear[120] that the use of bilateral treaties and "blacklisting" was ineffective in regulating offshore tax evasion, and a new solution was needed.[121] After years of negotiations[122] Congress decided upon a solution in 2010.[123] Instead of using bilateral and multinational treaties, the traditional tools of international law, Congress took a bold step in a new direction, promulgating a unilateral imposition of domestic law on foreign banks and companies.[124]

IV. FOREIGN ACCOUNT TAX COMPLIANCE ACT

The Foreign Account Tax Compliance Act (FATCA) was part of the

---

117. Commitment Letter from PJ Smith, Governor, Cayman Islands, to Donald Johnston, OECD Sec'y General (May 18, 2000), *archived at* http://perma.cc/BP7B-6EHA.

118. *Id.*

119. An example of harmful tax practices includes the banking secrecy laws which put them on the OECD list in the first place.

120. With the limited practical effect of "blacklisting" as evidenced above, and the failures of the bilateral treaty system exposed by the UBS case, the state of tax-haven regulation was not effective. *See generally* Press Release, Office of Senator Carl Levin, *supra* note 19.

121. Press Release, Office of Senator Carl Levin, *supra* note 19.

122. US SENATE SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFF., TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY 3 (2006) *archived at* http://perma.cc/N2T6-JBA9; Press Release, Office of Senator Carl Levin, *supra* note 19; Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. (2011); Stop Tax Haven Abuse Act, S. 1346, 112th Cong. (2011).

123. Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111-147, 124 Stat. 71 (2010), *archived at* http://perma.cc/859B-YCGK.

124. See explanation of FATCA provisions and how they are a unilateral imposition of domestic law into the international sphere in Part III, *infra*.

2010 Hiring Incentives to Restore Employment Act (HIRE)[125] and the solution proposed by Congress[126] and the Obama administration[127] to combat the problem of offshore tax evasion.[128] FATCA adds sections 1471 through 1475 to the Internal Revenue Code,[129] and has led to the promulgation of several Treasury Regulations designed to explain and help implement those provisions.[130] The goal of FATCA is to improve tax compliance involving foreign financial assets and offshore accounts to thereby increase tax revenue.[131] FATCA achieves this goal by forcing[132] three categories of foreign businesses[133] to enter into disclosure agreements with the IRS:[134] "foreign financial institutions,"[135] foreign companies with a "substantial US owner,"[136] and "passthru" companies.[137] These businesses are forced into disclosure agreements by an ultimatum: comply with the onerous[138] and expensive regulations[139] or have 30 percent of their US source income withheld.[140] The thought process is that by threatening foreign institutions where US citizens conceal their money to comply with IRS information reporting requirements, they will create an international withholding system similar to the one currently being used for US domestic income.[141]

A. Definitions and Implementation of the Withholding Ultimatum to Compel Information Disclosure

1. Foreign Financial Institutions

The regulation of "foreign financial institutions" is of perhaps the

125. HIRE §§ 501-535.
126. *Id.*
127. *100 in 100: Accomplishment No. 6*, ORGANIZING FOR ACTION (July 17, 2012), http://www.barackobama.com/nv/entry/nv-100-in-100-accomplishment-no-6-071712/, *archived at* http://perma.cc/HF36-58R5.
128. *Id*.
129. I.R.S. Notice 2011-32 I.R.B. 124 (Aug. 8, 2011) (Chapter 4 Implementation Notice).
130. Treas. Reg. § 9022-01 (2012).
131. *Id.*
132. 26 U.S.C. § 1471(a) (2010).
133. 26 U.S.C. §§ 1471-1475.
134. 26 U.S.C. § 1471(b).
135. 26 U.S.C. § 1471(d).
136. 26 U.S.C. §§ 1471-1475.
137. 26 U.S.C. §§ 1471-1475.
138. *See infra* Part III.A.3.
139. An estimated $30-40 per investor. Porritt, *supra* note 26.
140. 26 U.S.C. § 1471(a).
141. This idea will be fleshed out further in the following sections, but the domestic income tax system relies heavily upon the withholding of income by third parties, and the provisions of FATCA give the appearance of an international withholding system.

most important type of entity regulated by FATCA.[142] These institutions are banks and other financial businesses which have presented the United States with the biggest tax avoidance problem.[143] Under section 1471(a), any "withholdable payment" to a "foreign financial institution" that does not meet the reporting requirements of subsection (b) will have 30 percent of the payment deducted by a "withholding agent."[144] Thus, "foreign financial institutions" have a choice: face a 30 percent withholding tax on all "withholdable payments" or subject themselves to the reporting requirements of subsection (b).[145] As the withholding system provision demonstrates, the definitions for the operative FATCA terms are very important to the operation of the system,[146] and these definitions are broad so as to achieve the purpose of mandating a withholding regime.[147] To determine who falls under the withholding regulations of section 1471, there are three key terms which need to be defined: "foreign financial institution," "withholdable payment," and "withholding agent."[148]

The term "foreign financial institution" is the gatekeeper definition, signaling to which institutions the withholding ultimatum applies.[149] "Financial institution" is defined as any entity that "accepts deposits in the ordinary course of a banking or similar business," or "as a substantial portion of its business, holds financial assets for the account of others," or "is engaged primarily in the business of investing, reinvesting, or trading in securities, partnerships interests, commodities, or any interest in such securities, partnership interests, or commodities."[150] Under section 1471(d)(4), the definition of "foreign financial institution" is further refined as "any financial institution which is a foreign entity."[151] Through these definitions, "foreign financial institutions" are broadly defined[152] so as to include all foreign owned institutions that are involved in financial business.[153] This definition includes banks, investment firms, hedge funds, and even any entity which "hold[s] itself out as being engaged" primarily in

142. These institutions are the banks and financial centers where many Americans conceal their wealth overseas and are what FATCA was designed to regulate. Treas. Reg. § 9022-01.

143. *Id.*

144. 26 U.S.C. §§ 1471(a)-(b).

145. *Id.*

146. They are important in order to determine what entities fall under the scope of regulation. 26 U.S.C. § 1471(d).

147. *See* Dimitri Semenov et al., *FATCA Proposed Regulations*, 23 J. INT'L TAX'N 26, 27 (2012); Wheater, *supra* note 23, at 145.

148. 26 U.S.C. § 1471(d).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

the business of investing[154] in order to encompass almost all institutions that could aid a US citizen to avoid income taxes under the breadth of FATCA.[155]

The next step in the definitional framework is to find out what "withholdable payments" of the "foreign financial institutions" will be subject to the 30 percent withholding. Section 1473(1)(A) defines "withholdable payment" as

> any payment of interest, dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from sources within the United States . . . [and] any gross proceeds from the sale or other disposition of any property of a type which can produce interest or dividends from sources within the United States.[156]

Again, this definition is broad so as to include almost any type of monetary transfer on which foreign financial institutions depend for their business.[157] These withholdable payments are so broad that some industry experts have advised that "as soon as you invest in the US, you are in [the regulation's] scope."[158]

The final key definition in the withholding scheme is for "withholding agents."[159] These agents are defined as "all persons, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of any withholdable payment."[160] Designed to implement the withholding at an intermediary level before the funds exit the country,[161] the duty will most likely fall to US financial industry counterparts who oversee the transactions that lead to the foreign institutions obtaining the source income. The wording of these "withholding agents" as "all persons" in "whatever capacity" follows along with the broad definitions located in the other sections, designed to encompass all those who will be able to

154. 26 U.S.C. § 1473; Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 78 Fed. Reg. 5874 (Jan. 28, 2013); *see also* Semenov et al., *supra* note 147; Wheater, *supra* note 23, at 145.

155. 26 U.S.C. § 1473; 26 C.F.R. §1.1473-1; Semenov et al., *supra* note 147, at 27-28; Wheater, *supra* note 23, at 145.

156. 26 U.S.C. § 1473.

157. *Id.*; 26 C.F.R. §§1.1471-1.1474; Wheater, *supra* note 23, at 145.

158. Porritt, *supra* note 26.

159. 26 U.S.C. § 1473.

160. *Id.*

161. Treas. Reg. § 9022-01.

withhold a portion of the income.[162] With these broad definitions, the drafters of FATCA succeeded in their purpose of creating a large enough net to compel the foreign institutions that aid US citizens in avoiding tax reporting to comply with the FATCA reporting requirements.[163]

2. Beneficial Ownership of Foreign Companies

In addition to applying to "foreign financial institutions," FATCA, through section 1472, extends its reach to foreign companies who have a US citizen as a "substantial" owner.[164] Borrowing the definitions contained in the other areas of FATCA, section 1472 applies to any "withholdable payment" made to a "non-financial foreign entity."[165] "Non-financial foreign entity" is defined literally to mean a foreign entity that is not a financial institution.[166] Section 1472 also revolves around an ultimatum provision: subject to the reporting requirements or face a 30 percent withholding tax on all "withholdable payments."[167]

The term "substantial United States owner" is the key phrase when dealing with non-financial foreign entities, and is defined in section 1473(2).[168] Under section 1473(2), a "substantial United States owner" means with respect to any corporation, partnership, or trust, "any specified United States person which owns, directly or indirectly, more than 10 percent" of the stock in the corporation, or percent of the profit or capital interests in such partnership, or beneficial interests of such trust.[169] Furthermore, if the entity is a financial institution engaged primarily in the business of investing or trading in securities and the like, the 10 percent requirement is placed aside in favor of a 0 percent ownership requirement.[170]

3. Information Disclosure Agreements

The alternative to the 30 percent withholding for "foreign financial institutions" under section 1471 and "non-financial foreign entities" under section 1472 is to enter into an Information Disclosure Agreement.[171] Section 1471(b) sets out the web of onerous reporting requirements with

---

162. *Id.*
163. 26 U.S.C. § 1473; 78 Fed. Reg. 5874; Wheater, *supra* note 23, at 145; Porritt, *supra* note 26.
164. 26 U.S.C. § 1472.
165. *Id.*
166. *Id.*
167. *Id.*
168. 26 U.S.C. § 1473.
169. *Id.*
170. *Id.*
171. 26 U.S.C. §§ 1471-1472.

which a "foreign financial institution" must comply.[172] In order to comply, a "foreign financial institution" must enter into an agreement with the IRS under which the institution agrees to:

> Obtain such information regarding each holder of each account maintained by such institution as is necessary to determine which (if any) of such accounts are United States accounts, to comply with such verification and due diligence procedures as the Secretary may require with respect to the identification of United States accounts . . . [and] to comply with requests by the Secretary for additional information with respect to any United States account maintained by such institution.[173]

"United States accounts," which the reporting requirements seek to discover, are defined as "any financial account which is held by one or more specified United States persons or United States owned foreign entities."[174]

If an entity makes a reporting agreement with the IRS under subsection (b) as outlined above, it will be required to institute a system that will allow it to separate its clients based on US and non-US citizenship.[175] For all US accountholders, the financial institution will have to report the following information:

> The name, address, and TIN [Taxpayer Identification Number] of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner of such entity; the account number; the account balance or value; and except to the extent provided by the Secretary, the gross receipts and gross withdrawals or payments from the account.[176]

To implement the type of recording required by the FATCA provisions, most financial institutions are projecting a large cost increase[177] which will most likely be passed on to their customers.[178]

---

172. 26 U.S.C. § 1471.
173. 26 U.S.C. § 1471(b).
174. 26 U.S.C. § 1471(d).
175. 26 U.S.C. § 1471(c).
176. *Id.* (alteration added).
177. *Supra* note 139 and accompanying text.
178. *See supra* note 139 and accompanying text; David Jolly & Brian Knowlton, *Law to*

In addition to the costs of complying with the disclosure requirements, there is the potential for foreign entities to be subjected to potential lawsuits and fines.[179] One thing to keep in mind with these FATCA statutes is that they are US domestic laws which attempt to bind foreign entities who engage in business within the United States.[180] Because this applies to foreign entities, the drafters included section 1471(b)(1)(F) to provide that in regards to a financial institution:

> [A]ny case in which any foreign law would . . . prevent the reporting of any information referred to in this subsection or subsection (c) with respect to any United States account maintained by such institution: to attempt to obtain a valid and effective waiver of such law from each holder of such account, and if a waiver . . . is not obtained from each such holder within a reasonable period of time, to close such account.[181]

Designed to tackle banking secrecy laws head-on,[182] this provision allows entities that enter into disclosure agreements to circumvent their domestic laws.[183] While the United States may not favor the banking secrecy laws of foreign nations, they are still the laws of those foreign nations, and asking an entity to violate its domestic laws for the sake of an agreement with a foreign government is a highly questionable practice. For Swiss banks, violations of banking secrecy laws have led to bankers getting their licenses removed, fines, and even imprisonment.[184]

With the potential for negative legal effects in their home countries,[185] and a large cost with complying, the disclosure agreements are a strenuous requirement upon foreign institutions. Asking banks as large as UBS to identify and classify their customers based on US citizenship versus non-US citizenship, FATCA is quite an imposition.

Find Tax Evaders Denounced, N.Y. TIMES (Dec. 26, 2011), http://www.nytimes.com/2011/12/27/business/law-to-find-tax-evaders-denounced.html, *archived at* http://perma.cc/H2XP-5AYJ.

179. In several of these countries, such as Switzerland, the domestic laws prevent a bank from disclosing customer information, and could lead to criminal penalties within Switzerland. *See Swiss Banking Secrecy: Don't Ask, Won't Tell*, *supra* note 51 (description of the Swiss banking secrecy laws).

180. 26 U.S.C. §1471.

181. *Id.*

182. This provision directly challenges banking secrecy laws in other countries and attempts to circumvent them.

183. 26 U.S.C. §1471.

184. Federal Act on Banks and Savings Banks, art. 47, SR 952 (1934), *archived at* http://perma.cc/T6VU-K93H.

185. These effects include penalties and litigation associated with violating domestic secrecy laws. *Id.*

4. Passthru Payments

Perhaps the most controversial aspect of the FATCA reporting requirements is in regards to "passthru payments."[186] "Passthru payments" are defined as "any withholdable payment or other payment to the extent attributable to a withholdable payment"[187] and are utilized within the structure of the regulations as a stop-gap prevention against one of the more obvious loopholes.[188]

Under section 1471(b)(1)(D), a foreign financial institution that enters into a reporting agreement with the IRS must also deduct and withhold a 30 percent tax on any "passthru payment" made by such institution to a "recalcitrant account holder" or another foreign financial institution which has not entered into an agreement with the IRS.[189] "Recalcitrant account holders" are account holders in the financial institution who fail to comply with requests for information or fail to provide the foreign law waiver.[190] The passthru payment provision mandates a foreign financial institution to withhold money that is not its own. This includes money that belongs to individuals who do not fully disclose who they are or waive their rights under their domestic law, as well as money belonging to another financial entity who for whatever reason has decided not to comply with the FATCA regulations.[191] The IRS has recognized both the difficulty in implementing this part of the FATCA system, as well as the negative comments received from the financial industry, and as a result has pushed back the implementation of "passthru payment" regulation until 2017.[192]

B. Implementation through International Treaties

FATCA is not subtle.[193] It unilaterally imposes US domestic law on

186. James Barry et al., *U.S. Treasury Department and Internal Revenue Service Issue Supplementary FATCA Guidance*, 128 BANKING L.J. 638, 644-45 (2011); Wheater, *supra* note 23, at 153-54; Tom O'Donnell et al. *FATCA Proposed Regulations - Is It Finally Becoming More Manageable?*, 23 J. INT'L TAX'N 23, 25 (2012).

187. 26 U.S.C. § 1471(d)(7).

188. Barry et al., *supra* note 186, at 644 (noting the possible loophole allowing financial institutions using an intermediary that complies with FATCA as a conduit for all of their US source income, in order to keep US account holders anonymous and retain their US source income).

189. 26 U.S.C. § 1471.

190. 26 U.S.C. § 1471(d)(6).

191. *Id.*

192. O'Donnell, et. al, *supra* note 186, at 27; Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 26 C.F.R. §§1.1471-1.1474.

193. The very definitions within the statute directly state their application to foreign companies. 26 U.S.C. §1471.

foreign entities.[194] Although the FATCA supporters within the US government have charged forward headstrong in their resolve, they do appear cognizant of how other countries might negatively perceive this system.[195] As a result, there has been a recent push by the US government to compel compliance through another route: bilateral treaties.[196]

Claiming that these treaties minimize the burden upon foreign entities,[197] while facilitating coordination with local law restrictions[198] and improving collaboration with foreign governments,[199] the IRS and Treasury Department view this as a powerful tool in their arsenal.[200] Similar to the bilateral treaties that have been relied upon in the past,[201] these treaties allow a foreign financial institution located in a FATCA partner country an alternative means of complying with the requirements.[202]

There are two types of these intergovernmental agreements that the IRS has been using.[203] The first type is a hybrid between the bilateral tax information exchange agreements and the reporting requirements of FATCA, where a partner country agrees through a treaty to pass domestic legislation implementing FATCA's provisions.[204] With this domestic legislation, those entities subject to FATCA reporting will send the information to their countries' tax authorities, who in turn will exchange the information with the United States under the existing framework of tax information exchange agreements.[205]

The second type of intergovernmental agreement does not mandate legislation in the partner country to implement the collection of information and taxes, but merely requires the partner country not to impede the IRS in

194. *See id.*

195. Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 77 Fed. Reg. 9022-01, at 9023.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. They are similar in that both bilateral treaties and these FATCA agreements are negotiations between the two countries to effectuate the tax information disclosure between the countries.

202. Thomas A. Humphreys et al., *IRS Rolls out FATCA Intergovernmental Agreements*, MORRISON & FOERSTER LLP (Jan. 24, 2013), http://www.lexology.com/library/detail.aspx?g=79a2d0e4-0d3c-4a7f-905f-0f3db477896c, *archived at* http://perma.cc/V3FT-ZYT8.

203. *Id.*; Alan Granwell & Witold Jurewicz, *U.S. Treasury Department Announces Countries Engaging in FATCA Intergovernmental Agreement Discussions*, DLA PIPER (Nov. 14, 2012), http://www.dlapiper.com/us-treasury-announces-countries-engaging-in-fatca-discussions/, *archived at* http://perma.cc/GVK2-E27C.

204. *Id.*

205. *Id.*

implementing FATCA.[206] This version is an agreement that waives bank secrecy laws of the partner state and requires all of its financial institutions to enter into an "FFI agreement" with the IRS.[207] The second part of the agreement requires the partner jurisdiction to honor its obligations under existing bilateral treaties.[208] Not surprisingly, the United States has entered into negotiations with the Swiss government to implement this type of agreement and facilitate FATCA requirements on Swiss banks.[209]

By the end of 2012, the United States was in the process of finalizing intergovernmental agreements with four countries: the United Kingdom, Denmark, Mexico, and Ireland.[210] A review of the Treasury Department's website shows thirty-two countries have signed an intergovernmental agreement as of the publication of this Note.[211] Significantly, countries such as Switzerland, Bermuda, Luxembourg, Isle of Mann and the Cayman Islands have all signed agreements.[212]

The prevalence of these negotiations within the past two years,[213] and the comments of the treasury[214] indicate an increasing focus on implementing FATCA bilaterally through agreements with other countries, rather than unilaterally through US law.[215] As the introduction of the agreement with the United Kingdom indicates, international tax evasion is not just a problem for the United States, and the underlying policy goals of FATCA reporting requirements to improve tax compliance is important to other countries as well.[216] So while the use of intergovernmental agreements is primarily for the purpose of addressing legal impediments of implementing the domestic law of the United States upon foreign entities, it also serves the purpose of putting forth a multinational effort to reign in tax

206. *Id.*

207. *Id.*; 26 U.S.C. § 1471.

208. Granwell & Jurewicz, *supra* note 203.

209. Granwell & Jurewicz, *supra* note 203; Press Release, US Dep't of the Treasury, Treasury, Switzerland Agree to Pursue Framework for Cooperation for Implementing FATCA (June 21, 2012), *archived at* http://perma.cc/JF6Y-RFHY [hereinafter Treasury Press Release].

210. Granwell & Jurewicz, *supra* note 203.

211. *FATCA-Archive*, U.S. DEP'T OF TREASURY (May 16, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA-Archive.aspx, *archived at* http://perma.cc/NA8J-XZSL.

212. *Id.*

213. Granwell & Jurewicz, *supra* note 203; Treasury Press Release, *supra* note 209.

214. Treasury Press Release, *supra* note 209.

215. Treasury Press Release, *supra* note 209; Granwell & Jurewicz, *supra* note 203.

216. "Whereas, the Government of the United Kingdom of Great Britain and Northern Ireland is supportive of the underlying policy goal of FATCA to improve tax compliance…[w]hereas, the Parties are committed to working together over the longer term towards achieving common reporting and due diligence standards for financial institutions." U.K. FATCA Agreement, *supra* note 46 (alterations added).

avoidance.[217]

V. THEORY BEHIND IMPLEMENTING A WITHHOLDING SYSTEM IN THE INTERNATIONAL REALM

By requiring foreign companies to disclose certain taxpayer information under FATCA or face severe penalties, the US government is attempting to replicate the success of the domestic withholding system.[218] In the United States, the government uses a voluntary compliance system with the threat of penalties[219] and a withholding system by employers[220] to effectuate compliance. With the risk of audit at just above 1 percent of individual returns filed[221] and the average penalty for tax evasion close to 20 percent of the underpayment,[222] a lot of the heavy lifting is done by the employer withholding.[223] By putting the onus on the employers to disclose the earnings information and withhold the adequate amount of taxes, the government is taking the decision out of the hand of the taxpayer. While many would acknowledge that taxes are beneficial to some degree,[224] the idea of voluntarily giving up a portion of hard-earned cash for slight, if any, recognizable quantifiable return[225] seems to be a tough sell.

This conflict between the individual and society is perhaps best described by the theory of collective action, which posits that individuals will behave like rational wealth maximizers.[226] Those individuals will rarely find it justifiable to contribute resources to attaining collective goods, but instead will free-ride on the contributions that others make.[227] As a result,

---

217. *See generally* U.K. FATCA Agreement, *supra* note 46.

218. The IRS estimates that 83 percent of domestic income taxes are collected. Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1784 (2000).

219. *Topic 306 - Penalty for Underpayment of Estimated Tax*, INTERNAL REVENUE SERV., http://www.irs.gov/taxtopics/tc306.html (last updated Jan. 22, 2014, *archived at* http://perma.cc/FPY2-MAHS).

220. *Tax Withholding*, *supra* note 5.

221. *See* INTERNAL REVENUE SERV., FISCAL YEAR 2011 ENFORCEMENT AND STATISTICS (2011), *archived at* http://perma.cc/Y65A-3A4E.

222. Posner, *supra* note 218, at 1783.

223. Posner, *supra* note 218, at 1784.

224. Most major political parties in the United States recognize taxes as a necessary part of the federal government, and it has become acceptable to some degree. *But see* LIBERTARIAN PARTY, LIBERTARIAN PARTY PLATFORM para. 2.4 (2012), *archived at* http://perma.cc/6MRX-RKRR (The libertarian party vehemently opposes the income tax and calls for it to be repealed.).

225. While all benefit from the protection and infrastructure provided by government, it is often hard to see and is not as tactile as the individual having more of his or her funds.

226. OLSON, *supra* note 2, at 2.

227. OLSON, *supra* note 2, at 21.

the group will be harmed because too few individuals will contribute.[228] According to the father of collective action theory,[229] Mancur Olson, the only way to overcome this problem is to provide external influences, either in the form of subsidies or penalties, to herd individuals into compliance for the benefit of the community.[230] In the domestic tax sphere, the US government has circumvented this problem entirely through the employer withholding system, and is attempting to do the same in the international realm with FATCA.[231]

So what occurs when the decision is left to the individual? When an individual examines whether or not to comply with the external influences in the tax system, i.e. audit risk and underpayment penalties, he or she can be understood to be engaging in a modified prisoner's dilemma.[232] One element of the decision is the theory of "signaling" posited by Eric Posner.[233] Signaling is based on an assumption that society consists of a great deal of cooperative relationships, each of which has the structure of a repeated prisoner's dilemma.[234] Based on the existence of this web of repeated prisoner's dilemmas, an individual has the choice in each one whether to cooperate or cheat, and "players may refrain from cheating in the hope that they will develop a reputation for not cheating—both within

---

228. OLSON, *supra* note 2, at 35.

229. Because he wrote the book THE LOGIC OF COLLECTIVE ACTION, Olson is the person most associated with the development of Collective Action logic. *See* THE ECONOMIST, OBITUARY: MANCUR OLSON, Mar. 5, 1998, *archived at* http://perma.cc/N6VY-RKMW.

230. Posner, *supra* note 218, at 1791.

231. 26 U.S.C. §1471(a).

232. Professor Eskridge explains that the classic

> prisoner's dilemma consists of two prisoners, each of whom is offered a deal: If you betray your colleague and he is loyal to you, you will get a benefit of eight (say a good plea bargain). And if one prisoner is loyal and his colleague betrays him, he will get no benefit (the other prisoner gets the benefit). Each prisoner also knows that if he is loyal and his colleague is also loyal, they each get a benefit of five. However, if both prisoners betray one another, they both get a benefit of only two. . . . The best strategy would be for both prisoners to be loyal. Yet under the circumstances of the prisoner's dilemma game, each prisoner acting separately will tend to betray the other.

William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U.L. REV. 382, 389-90 (1993) (alteration added). Professor Eskridge further explains: "Acting rationally but not knowing what B will do, A faces possible benefits of two or eight if he betrays, but only zero or five, respectively, if he does not betray. Given such a choice, A will betray. B will also betray under the same reasoning." *Id.* at 390, n.29. Public goods games can be conceived of as prisoner's dilemma games because each player's rational move is not to contribute, but total welfare is maximized if all players contribute. *See also* Steven Kuhn, *Prisoner's Dilemma*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 22, 2007), http://plato.stanford.edu/entries/prisoner-dilemma/, *archived at* http://perma.cc/B7SU-5K9E; Posner, *supra* note 218, at 1786.

233. Posner, *supra* note 218, at 1787.

234. Posner, *supra* note 218, at 1786.

an existing relationship and generally amongst others in society."[235]

The key to understanding the prior conflict of the offshore bank account problem is that those individuals were not located within the community envisioned by Olson and Posner. Their choice to place assets outside of the detection and reach of the withholding system is a loophole that allows the individual to maximize wealth potential while avoiding the negative "signaling" associated with individual-motivated actions.[236] The FATCA regime tries to extend the domestic taxation system, forcing individuals into a withholding system[237] with the risk of receiving negative signaling consequences.[238] The success of the domestic tax collection system, which FATCA is attempting to replicate in the international realm, is predicated on the successful application of withholding to those offshore tax evaders.[239]

VI. ANALYSIS

A. International Relation Implications

Even with the recent focus by the United States on intergovernmental agreements with other countries to implement the reporting requirements, FATCA is still a stark departure from previous international law precedent.[240] Most of the treaties and agreements that constitute international law have relied upon non-binding, vague language to effectuate broader policy goals.[241] Whether through multinational organizations, or bilateral treaties, the power of a given agreement is limited to the power an individual sovereign nation is willing to give up.[242]

---

235. Posner, *supra* note 218, at 1786.

236. Posner, *supra* note 218, at 1786.

237. 26 U.S.C. § 1471 (2010).

238. Posner, *supra* note 218, at 1816.

239. Through the broad definitions, FATCA seeks to come as close as practically possible to the domestic system's universal application of withholding, although it will inevitably fall short because the definitions are predicated on the foreign entities caring about doing business within the United States. 26 U.S.C. § 1471.

240. *See supra* Part II for a discussion of the reliance on ineffective bilateral and multinational treaties.

241. For example, see the language used in the OECD commitment letter for the Cayman Islands, where the Government of the Cayman Islands "commits to refrain from…introducing any new regime that would constitute a harmful tax practice….strengthening or extending the scope of any existing measures that currently constitute a harmful tax practice." Commitment Letter, *supra* note 117. These commitments basically amount to promises not to expand an already thriving tax haven, and as such are vague and lack true reform.

242. U.N. Charter art. 2, June 26, 1945, *archived at* http://perma.cc/XAH3-H4WM; for an example of such a limiting agreement see Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

In the realm of international relations, the fear of surrendering too much sovereignty often has to be balanced with pressures from other countries. The quintessential example of international pressure comes from the Cold War exploits of the United States and the USSR, where both countries sought influence across the globe.[243] There is a fine line in international relations between preserving sovereignty on the one hand and keeping up good international relations on the other. As a result of the tightrope that must be walked between the two, it is only logical that most countries do not appreciate another that asks too frequently for sovereignty concessions and for too much advantage through international agreements. Understandably, the international community does not appreciate an actor who unilaterally imposes its will onto other countries to effectuate domestic policies. This unilateral imposition is a complete disregard for the sovereignty of the foreign nation and thus a disregard for international relations as a whole.

In the past decade, the United States has found out the hard way that unilateral imposition on another nation's sovereignty, even for a beneficial reason, damages a country's international reputation if the proper protocols are not followed.[244] In order for international law and order to work, it has to apply uniformly to all parties involved, and all states must respect the sovereignty of other states. While the old, pre-WWII system of international relations would allow unilateral impositions upon another state's sovereignty,[245] the multinational system of cooperation in today's world requires something different.

In this system of international relations, FATCA sticks out like a sore thumb and a relic of old. The very concept of FATCA is for a unilateral imposition of US domestic policy onto entities located in foreign sovereign states.[246] While the trend towards intergovernmental agreements reduces the brazenness of this move, the agreements are still the same exact implementation of US domestic law.[247] As a country coming to the negotiating table with the United States, you have three options. First, you could enter into an agreement with the United States;[248] second, you could not enter into an agreement and have the United States implement its laws onto your financial institutions anyway;[249] or third, you could inform your

243. *See generally* Burton Kaufman, *The Cold War: U.S.S.R. and the United States*, THE HISTORY PROFESSOR, http://thehistoryprofessor.us/bin/histprof/misc/coldwar.html (last visited Feb. 9, 2013, *archived at* http://perma.cc/3PMV-6AGL).

244. *See* Joint Declaration by Russia, Germany and France on Iraq, Feb. 10, 2003, *archived at* http://perma.cc/JG3S-GQTL.

245. This was due to a lack of an effective multinational legal system.

246. *See infra* Part III.

247. 26 C.F.R. §§1.1471-1.474.

248. The FFI Agreement is outlined in 26 U.S.C. § 1471(b)(1) (2010).

249. The withholding mechanisms are set out in 26 U.S.C. § 1471(b)(1)(D).

institutions not to do business in the United States or with an entity that would bring them under the FATCA requirements.[250]

The United States is the largest and most "technologically powerful" economy in the world, with the second highest GDP, behind only the European Union.[251] The United States also has the highest market value of shares of publicly traded corporations, almost double that of any other country.[252] The New York Stock Exchange and NASDAQ are the two largest stock exchanges in the world.[253] With how interconnected the financial world is today,[254] telling a financial institution to not conduct its business in the United States can severely affect that entity's profitability because of the size of the US capital markets.[255] And when the passthru payment provisions are implemented, it will be nearly impossible for reputable financial institutions to not fall under the 30 percent withholding of FATCA.[256] So even when the United States comes to negotiate an intergovernmental agreement, it is merely a veiled unilateral imposition of its domestic law.

While the United States may still carry a great deal of weight and enjoy a level of respect from other countries who view it as the predominant hegemon, good will and hegemonic status can only go so far. By implementing FATCA, the United States is continuing to stray from the path of multinational agreements and the frameworks of international law that have been developing for the past seventy years. By continuing down the unilateral "my way or the highway" approach, the United States is subverting the international institutions that it helped found[257] in favor of an

---

250. This third solution will become more difficult once the "passthru payment" provisions of FATCA are enacted. *See* O'Donnell, et. al, *supra* note 186, at 27.

251. *CIA World Factbook: The United States*, CENTRAL INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last updated Nov. 12, 2013, *archived at* http://perma.cc/5XZV-U8C8).

252. *Id.*

253. *Ten Largest Stock Exchanges in the World by Market Capitalization, 2011*, WORLD STOCK EXCHANGES, http://www.world-stock-exchanges.net/top10.html (last visited Feb. 26, 2014, *archived at* http://perma.cc/W9X7-F3M2); *Annual Statistics Reports,* WORLD FED'N OF EXCHANGES, http://www.world-exchanges.org/statistics/annual (last visited Feb. 9, 2013, *archived at* http://perma.cc/8PGQ-WERN).

254. Marina Primorac, *The Global Village: Connected World Drives Economic Shift*, INT'L MONETARY FUND SURVEY MAG. (Aug. 30, 2012), http://www.imf.org/external/pubs/ft/survey/so/2012/new083012a.htm, *archived at* http://perma.cc/EKR4-Z33C.

255. The United States contains the two largest trading markets and second highest GDP. *CIA World Factbook: The United States*, *supra* note 251.

256. *See supra* Part III.

257. The recent wars in Afghanistan and Iraq, and America's inability to join the International Criminal Court have led to a great deal of negative criticism of America's international policy in recent years. *See generally* Marlise Simons, *U.S. Grows More Helpful to International Criminal Court, a Body it First Scorned*, NY TIMES, Apr. 2, 2013, *archived*

outdated and unsustainable method of international relations.[258] While the United States may still enjoy hegemonic status for now, there will come a day when other countries have the spotlight and the tables may turn. And even if that eventuality is a long way off, there is no denying that advances in technology have made our world interconnected to the point where the old unilateral method of international relations is no longer a viable option.[259]

B. Negative Effect upon US Capital Market

The United States is just beginning to recover from the effects of the worst economic recession since the Great Depression.[260] With the largest financial economy in the world,[261] implementing rules that could cost an estimated thirty to forty US dollars per customer to implement[262] appears to be a strong disincentive to doing business within the United States. By placing such a large cost upon the businesses, the United States will require foreign businesses to seriously consider choosing an alternate route before investing in any US company.

While "Wall Street" and large companies may not be the most popular groups in America,[263] they comprise a very important part of the economy.[264] Publicly traded corporations rely upon investors to provide them with money that they can then use for purposes such as hiring employees or developing new technology.[265] Foreign investment in the United States amounts to $21 trillion, and $10.5 trillion of that is invested in

---

at http://perma.cc/E7V3-37E5.

258. The unilateral method of international relations that was prevalent before World War Two has been sharply criticized as ineffective in the modern world. *See Capsule Reviews: Unilateralism and U.S. Foreign Policy: International Perspectives*, FOREIGN AFFAIRS (May/June 2003), http://www.foreignaffairs.com/articles/58894/g-john-ikenberry/unilateralism-and-us-foreign-policy-international-perspectives, *archived at* http://perma.cc/EVT9-AB62.

259. This is due to the interconnectivity of the various first-world countries whose economies entirely depend upon one another. Primorac, *supra* note 254.

260. *Three Economists Agree 2009 Worst Financial Crisis since Great Depression; Risks Increase if Right Steps Are Not Taken*, REUTERS (Feb. 27, 2009), http://www.reuters.com/article/2009/02/27/idUS193520+27-Feb-2009+BW20090227, *archived at* http://perma.cc/SEJ2-NHZE.

261. *Annual Statistics Reports*, *supra* note 253.

262. Porritt, *supra* note 26.

263. *See, e.g.*, Erik Eckholm & Timothy Williams, *Anti-Wall Street Protests Spreading to Cities Large and Small,* N.Y. TIMES (Oct. 3, 2011), http://www.nytimes.com/2011/10/04/us/anti-wall-street-protests-spread-to-other-cities.html, *archived at* http://perma.cc/6K2W-8AGP.

264. Daniel Indiviglio, *Why You Shouldn't Hate Wall Street*, ATLANTIC (Oct. 6, 2011), http://www.theatlantic.com/business/archive/2011/10/why-you-shouldnt-hate-wall-street/246282/, *archived at* http://perma.cc/WE99-KKBY.

265. *Id.*

US securities.[266] A KPMG survey indicated that only 36 percent of financial institutions polled are definitely planning to remain in the US and comply with FATCA.[267] For a bank such as UBS, the estimated thirty to forty dollars in customer compliance costs[268] is a large burden, and while they and other large financial institutions could bear the cost or pass it on to their customers, the question becomes whether or not investment in the United States is worth that price.

Another problem affecting the US capital market comes from the smaller financial institutions which will likely be unable to sustain the added costs of FATCA compliance and will be required to change business drastically or close entirely.[269] While the overall decrease in investment in the US capital markets is hard to determine, even if a small percent of the $234 billion per year[270] exits, it would be a major hit to the US economy.

C. Effect upon US Citizens Living Abroad

The Bureau of Consular Affairs within the US Department of State estimates that there are approximately 6.8 million Americans living abroad.[271] Currently, United States taxpayers living abroad must file two tax returns, one for the country in which they reside, and the other with the IRS.[272] While almost 82 percent of all Americans living abroad who filed their returns with the IRS owed no US taxes, there is still the possibility that they can face double taxation.[273]

Under the FATCA regulations, this group of US citizens, who are not

---

266. *Why FATCA is Bad for America - Update,* AMERICAN CITIZENS ABROAD, http://americansabroad.org/issues/fatca/fatca-bad-america-why-it-should-be-repealed/ (last updated Aug. 9, 2013, *archived at* http://perma.cc/T3KU-F7NW).

267. FATCA AND THE FUNDS INDUSTRY: DEFINING THE PATH, KPMG 6 (June 2011), *archived at* http://perma.cc/8GL6-C9DL.

268. Porritt, *supra* note 26.

269. Jolly & Knowlton, *supra* note 178.

270. The U.S. attracted $234 billion in foreign direct investment in 2011. Neil Shah, *Foreign Investment Surges*, WALL STREET JOURNAL, (June 15, 2012), http://online.wsj.com/news/articles/SB10001424052702303410404577466692621011900, *archived at* http://perma.cc/6JX9-RLUB. While not all foreign direct investment will be subjected to FATCA, this figure shows the vast sums of money that foreign individuals and companies contribute to the United States, and with the volatility of the marketplace, the imposition of strict and complicated rules could damper investment even if such investment has no relation to the rules.

271. *Who We Are and What We Do: Consular Affairs by the Numbers,* BUREAU OF CONSULAR AFFAIRS, U.S. DEPARTMENT OF STATE (May 2013), http://travel.state.gov/pdf/ca_fact_sheet.pdf, *archived at* http://perma.cc/Q4G6-NCY6.

272. *See* American Citizens Abroad et al., *Residence-Based Taxation: A Necessary and Urgent Tax Reform* 4 (Overseas Americans Week, Working Paper, 2013), *archived at* http://perma.cc/7RDC-3DJH.

273. *Id.*

the target of the statute,[274] will fall under its grasp and be subject to it.[275] It is entirely possible that some of these US citizens will be forced to leave their foreign bank if that entity decides to not accept US citizens as clients. Because of the stringent reporting requirements[276] and the large unforgiving penalty structure in place with violating those requirements,[277] it is very possible that these innocent-intentioned people could find themselves in a great deal of trouble for a very small mistake. FATCA was set up to reign in US citizens' usage of offshore bank accounts to avoid taxation,[278] not to force a citizen living abroad from using a local bank out of convenience. This area of overlap within the regulations is concerning, as unknowing US citizens living abroad could be subjected to the effects of FATCA.

VII. RECOMMENDATION TO RE-THINK WHETHER PENALIZING TAX AVOIDERS IS IN THE BEST INTERESTS OF THE COUNTRY

A. FATCA's Logical End

When trying to influence a person's decision, you can entice her or threaten her to achieve a desired result. Commonly known as the "carrot or the stick," this behavioral dilemma at its very essence is based on the idea that in order to get a person to do what you need her to do, there has to be motivation compelling her to do so, and depending on the situation, a varying degree of carrot or stick is needed. FATCA is all stick and no carrot.

While there is some credence to using a strict law with stiff penalties,[279] the purpose of FATCA is to reign in those who keep funds in offshore accounts by motivating their compliance with the US tax code by cutting off their offshore resources.[280] By mandating the reporting requirements, FATCA is forcing the facilitators of these tax evaders to become agents of the US government. This gives the tax evaders a choice: give in and report their information and pay taxes, or continue to evade by moving to another offshore bank that does not face the same motivation to be compelled into FATCA.

A cursory glance at economic studies will support the generality that

---

274. Treas. Reg. § 9022-01 (2012).

275. *See* American Citizens Abroad, *supra* note 272.

276. *See supra* Part III.

277. *See supra* Part III.

278. Treas. Reg. § 9022-01.

279. *See generally* Agnar Sandmo, *The Theory of Tax Evasion: A Retrospective View*, (Nordic Workshop on Tax Policy and Public Economics, Discussion Paper 31/04, 2004), *archived at* http://perma.cc/N55T-YPWP.

280. Using the reporting or withholding system of 26 U.S.C. § 1471, FATCA tilts the scale for foreign financial institutions, making it very disadvantageous to continue harboring tax evaders.

there is always a market where there is demand.[281] There are an estimated $1 trillion in assets held by Americans in offshore accounts.[282] Those assets, if discovered by the US government, will be subjected to the requisite tax due, and could be subject to additional taxes, substantial penalties, interest, fines, and could even lead to imprisonment for the individual.[283] The stiff penalties in place provide a very strong demand for an "offshore banking haven" that can protect US citizens from these penalties.[284] It is unrealistic to believe that the demand for favorable tax treatment and protection from the stiff penalties will just disappear.[285]

Currently, the IRS is entering into its third "amnesty" period.[286] During this period, an offshore tax evader can amend their tax returns to reflect foreign assets if they pay a hefty 27.5 percent penalty.[287] As of June 2012, there have been approximately 33,000 US citizens who have taken advantage of these amnesty periods from which the government has collected over $5 billion.[288] While the efforts of the IRS and its success in collecting more than $5 billion is laudable, its insistence to continue using the threat of FATCA against the evaders who remain is troubling. After three amnesty periods[289] and a great deal of news regarding offshore tax shelters,[290] it is unrealistic to believe that funds are located offshore due to ignorance. This leaves one possible reason why people still retain these accounts: because it makes financial sense.

These accounts are often very sophisticated and are designed primarily to maximize return on capital by avoiding the demanding taxes of the United States.[291] The people left with these accounts have now had three opportunities to bring their offshore accounts into compliance.[292] They have

---

281. Reem Heakal, *Economics Basics: Supply and Demand*, INVESTOPEDIA, http://www.investopedia.com/university/economics/economics3.asp#axzz2KTIfkso4 (last visited Feb. 9 2013, *archived at* http://perma.cc/PS82-38HN).

282. *Abusive Tax Schemes*, *supra* note 7.

283. *Income from Abroad is Taxable,* INTERNAL REVENUE SERV., http://www.irs.gov/Businesses/Income-from-Abroad-is-Taxable (last updated Sept. 3, 2013, *archived at* http://perma.cc/U2ZR-DW4W).

284. Sandmo, *supra* note 279.

285. Sandmo, *supra* note 279.

286. Press Release, IRS Offshore Programs Produce $4.4 Billion to Date for Nation's Taxpayers; Offshore Voluntary Disclosure Program Reopens (Jan. 9, 2012), *archived at* http://perma.cc/D5AE-RR4B.

287. *Id.*

288. Press Release, IRS Says Offshore Effort Tops $5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole (June 26, 2012), *archived at* http://perma.cc/9KRQ-AEZP.

289. *See, e.g., id*.

290. *See, e.g.*, Levin, *supra* note 19.

291. *See supra* Part I-A-1 (describing how banks utilize the strong privacy laws of their country to attract customers who require discretion and privacy).

292. Press Release, IRS Offshore Programs Produce $4.4 Billion to Date for Nation's

examined their situations and determined that the best decision for them is to keep their money offshore and accept the risk that the United States may find them. FATCA attempts to rein these ardent avoiders in by taking away their banks. And although FATCA has a broad reach, its problem is that it is not universal.

When there is a demand for a service such as international tax avoidance, the only way to combat it effectively is make it as close to universally illegal as possible. By increasing the breadth and scope of international tax law to the point where tax avoiders cannot hide their money by staying one step ahead of the United States and switching banks, the government will be in the best position to control the market and lessen the demand.[293] FATCA, however, is not so broad,[294] and thus instead of eliminating the market for offshore "havens," it will merely push it elsewhere.

Historically the demand for offshore "havens" have been mostly filled by medium to large sized reputable banks located in countries with strong privacy laws such as Switzerland, Luxembourg, the Cayman Islands, the Bahamas, and the like.[295] Most of these banks have become the choice of many US citizens because their size affords a convenience—the banks usually deal heavily within the United States and often have offices in the country.[296] FATCA is designed to target these larger banks directly,[297] and other banks within developed nations are "compelled" to enter into intergovernmental agreements to implement FATCA themselves.[298]

By taking away the larger, reputable banks in well-developed countries, FATCA pushes the markets into areas where the financial institutions do not regularly deal in US "source income" and are not overly persuaded to give up domestic sovereignty if the United States flexes its muscle.[299] These are the locations where FATCA cannot reach, and where the money will find its way.

The implications of this shift are troubling. The countries in the world that do not routinely do business with the United States or do not care about its influence are those which are often the most dangerous countries. The problem with trying to avoid the watching eye of the US government for tax purposes is that it pushes tax evasion to the same places that terrorists, drug cartels, and other black market individuals also must go.

Taxpayers; Offshore Voluntary Disclosure Program Reopens, *supra* note 286.

293. Sandmo, *supra* note 279.

294. As discussed in Part III, FATCA only applies to companies that do business within the United States.

295. US SENATE SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFF., *supra* note 122.

296. Levin, *supra* note 19.

297. 26 U.S.C. § 1471 (2010).

298. 26 C.F.R. §§ 1.1471- 1.1474.

299. This includes countries in Africa and the Middle East where the United States does not carry as much weight.

Perhaps the most concerning country that this market could move to is China. As of October 2012, China owned $1.2 trillion in US Treasury bonds, or 10 percent of the US national debt,[300] and has become a very important trading partner.[301] If China wanted to use its political sway to take advantage of creating a market for international tax avoiders, it is unlikely that anyone would be able to stop it.

Because the tax avoiders left in the offshore arena are there for their own financial reasons, it is unlikely that FATCA will force compliance. So while FATCA is recognized by some as a success,[302] that success is only short-term, as a result of capturing the funds of the non-ardent avoiders. When taken to its logical end, FATCA will push funds into the hands of dangerous people and unreliable institutions in dangerous countries.[303]

B. What Should Be Done?

While the philosophical discussion over which motivational tool works better—the stick or the carrot—has been a well-documented contest,[304] the determination is predominantly dependent on the facts of a given scenario. Due to the surrounding facts or background information, some situations call for more stick than carrot or vice versa. The background information of the person involved sets the scene for how they can be expected to perceive and react to the motivation. By examining the facts of a given situation, the motivator must then decide which of the very different techniques he should use to achieve his goals.

The principal benefit of using a stick to motivate an individual is deterrence.[305] By imposing strict and daunting penalties, and using those penalties to threaten individuals into action, they are motivated not to be

300. *China's Holdings of U.S. Debt*, WASHINGTON POST (Oct. 16, 2012), http://www.washingtonpost.com/business/economy/chinas-holdings-of-us-debt/2012/10/16/075f71c0-17ee-11e2-9855-71f2b202721b_graphic.html, *archived at* http://perma.cc/F92-AEXL.

301. Dan Ikenson, *Soured U.S.-China Relationship Approaches Inflection Point*, FORBES (Jan. 1, 2013), http://www.forbes.com/sites/danikenson/2013/01/29/reading-the-tea-leaves-on-u-s-china-economic-relations/, *archived at* http://perma.cc/V8B-YEND.

302. Robert Wood, *FATCA Fuels IRS Amnesty, but Advocate Calls it Harsh*, FORBES (Feb. 2, 2014), http://www.forbes.com/sites/robertwood/2014/02/02/fatca-fuels-irs-amnesty-but-advocate-calls-it-harsh/, *archived at* http://perma.cc/DMS2-GF2D.

303. Bashar Malkawi, *Bank Secrecy in Arab Countries: A Comparative Study*, 123 BANKING L.J. 894, 894 (2006); Bruce Zagaris, *International Enforcement Law Trends for 2010 and Beyond: Can the Cops Keep up with the Criminals?*, 34 SUFFOLK TRANSNAT'L L. REV. 1 (2011); Daryl Shetterly, *Starving the Terrorists of Funding: How the United States Treasury is Fighting the War on Terror*, 18 REGENT U. L. REV. 327, 328-29 (2006).

304. *See generally* Andy Henion & Karen Sedatole, *Carrots, Not Sticks, Motivate Workers*, MICH. STATE UNIV. (June 20, 2012), http://msutoday.msu.edu/news/2012/carrots-not-sticks-motivate-workers/, *archived at* http://perma.cc/7SPJ-GK6S.

305. *See id.*

harmed.[306] In order for this type of motivation to be effective, the individual must both fear the penalties and believe that the motivator will carry out the punishment. For the deterrence effect to work as motivation, the individual must believe that his failure to act in a desirable way will result in the penalties. An important variation on how effective a specific deterrent can be is how likely an individual will be found to be in violation of the rule.[307] The penalties can be extremely strict and strike fear into the heart of the individual who believes that the motivator will carry out the action but still decides to not act in the desired manner because there is a very small chance that the variance will be discovered.

The carrot on the other hand relies on a beneficial reward for the desired performance. Also relying upon the individual's belief that the motivator will carry through with his promise, this dynamic relies upon how "shiny" the reward is.[308] Conversely from the deterrence motivation, the higher the reward available to an individual, the less likely the chance of receiving that reward has to be in order for the individual to perform as desired.[309]

The individuals with offshore bank accounts have determined that keeping their funds overseas is in their best interest, and that it is worth the risk of severe penalties[310] if the US government should find them. These individuals have already evaluated the "stick" of US government penalties prior to FATCA and have now been afforded three opportunities to re-evaluate their positions after taking into account FATCA's more strenuous rules that increase the chances that they will be discovered, and yet they still maintain their offshore accounts. FATCA is not designed to adequately address these individuals. All FATCA can do in regard to these individuals is push them further away from large reputable banks located in friendly countries to those that are less desirable.[311]

The FATCA "stick" is not the right tool for achieving the goal of increased revenue and compliance with US tax laws with respect to the ardent tax avoiders left with assets overseas. While the government is focused merely on getting these individuals to report their information and collect tax on those offshore funds,[312] the better solution is to entice these

306. *See id.*

307. This claim relies on the basic assumption that an individual uses a probability of a negative effect happening when evaluating whether or not to commit an action. This is especially true in the financial world where decisions about monetary assets have a concrete effect on those assets, and many individuals go through systematic cost benefit analysis.

308. Margaret Christ et al., *Sticks and Carrots: The Effect of Contract Frame on Effort in Incomplete Contracts*, 87 ACCOUNTING REV. 1913, 1917 (2012).

309. This is a furthering of the logic from the logical assumption that risk of a negative effect and size of the payout are linked. *See generally id*.

310. *Income from Abroad is Taxable, supra* note 283.

311. *See supra* Part IV.

312. 26 C.F.R. §§ 1.1471- 1.1474.

avoiders to bring their assets back onto US soil. By bringing the $1 trillion in assets[313] back onto US soil there are potentials not only for tax collection, but many more economic benefits, such as creating jobs and freeing up capital for investment.

The problem with using the "carrot" to attract avoiders back onto US soil is that public opinion would most likely not favor leniency.[314] The last few years have seen a growing groundswell of opposition against wealthy individuals who appear able to manipulate the laws at the expense of other taxpayers in order to improve their bottom line.[315] Although on a purely economic side, allowing offshore tax avoiders to bring their money back into the country would be beneficial, it would be a "third rail"[316] in terms of public policy.

The solution to this barrier of public opinion is to compromise by giving enough of an enticement to compel the avoiders to bring their assets back onto US soil, while giving enough of an appearance of punishment to satisfy the public. One possible solution could be to create a large fund in which all returning offshore assets must be kept for a certain period of time, such as three or five years. The fund could be used to fund federal or state projects and give the tax avoiders a reasonable rate of return for borrowing the money which could then be used to benefit the public at large. While this is just one idea, it shows how, if both sides of the table (or both prisoners) decide to accept the compromised deal, both will be better off because of it.

VIII. CONCLUSION

FATCA constitutes a departure from previous tax collection methods, and has caused a great deal of concern in the accounting and financial worlds.[317] The possibility of a negative effect on US capital markets, the strain on the United States' waning international influence, the dim prospects of collecting revenue, and other issues make FATCA a troubling piece of legislation. Even with the Treasury Department's focus on using intergovernmental agreements to effectuate the implementation of FATCA, it is still only a veiled unilateral imposition of US domestic law on the international community. Perhaps most troubling is the fact that FATCA is

313. Levin, *supra* note 19.

314. *See, e.g.*, Eckholm & Williams, *supra* note 263.

315. *See e.g.*, Eckholm & Williams, *supra* note 263.

316. "Third Rail" is a metaphor for any political issue so controversial that it is "charged" and "untouchable" and will bring negative effects to any politician who attempts to tackle it. *See generally Third Rail Politics*, CHI. TRIB. (Sept. 27, 2010), http://articles.chicagotribune.com/2010-09-27/news/ct-edit-tenth-20100927_1_dold-and-seals-private-accounts-social-security, *archived at* http://perma.cc/G44J-ATUZ.

317. Jolly & Knowlton, *supra* note 178; Porritt, *supra* note 26.

so broad as to cause a great disturbance in the financial industry, but not broad enough to reach the ardent tax avoiders that it seeks to cover.[318]

FATCA only pushes the market for offshore tax evasion deeper into the darkness and further from reputable institutions. The best solution to increase the revenue of the IRS and decrease the amount of individuals avoiding taxes is to entice those individuals to move their assets back onto US soil with favorable treatment. Although public opinion will most likely prevent this from occurring, a compromise must be struck. The American public and the tax avoiders are locked in a prisoner's dilemma and they must work together to find the best solution for all parties involved.

318. *See supra* Part IV.

LA MANO EXTENDIDA: THE INTERACTION BETWEEN INTERNATIONAL LAW AND NEGOTIATION AS A STRATEGY TO END GANG WARFARE IN EL SALVADOR AND BEYOND

Emma Mahern*

I. INTRODUCTION

In August 2012 and again in May 2013, gang members came face-to-face with government leaders and representatives of the Organization of American States (OAS).[1] The gang members arrived with hundreds of weapons; they were not there to use these weapons, but rather to lay down their arms as a sign of good faith in their struggle to negotiate a lasting peace.[2]

Over the past decade there has been increasing awareness of transnational gangs as a threat to regional security in the Americas.[3] This led Silvia Aguilar, the El Salvadorian Vice-Minister of Justice, to say that "[d]omestic crime and its associated destabilization are now Latin America's most serious security threat."[4] According to a 2012 report by the International Center for Migrant Human Rights, crime is now the main cause of displacement in Central America, and it is comparable to the displacement caused by civil wars in the region in the 1970s and 1980s.[5] In 2011, the Geneva Declaration's Global Burden of Armed Violence Report named El Salvador the country with the world's most violent deaths.[6] Transnational gangs have been linked to shocking displays of violence, drug and human trafficking, as well as extortion. The regional and domestic strategies of the countries most affected have been a blend of suppression

---

* Emma Mahern is a 2014 graduate of the Indiana University Robert H. McKinney School of Law.

1. *Pandillas salvadorenas entregan armas como parte de una tregua: Episode 130527* (Univision Noticias broadcast May 28, 2013), *archived at* http://perma.cc/A9NW-8YN9.

2. *Id.*

3. MAX G. MANWARING, A CONTEMPORARY CHALLENGE TO STATE SOVEREIGNTY: GANGS AND OTHER ILLICIT TRANSNATIONAL CRIMINAL ORGANIZATIONS IN CENTRAL AMERICA, EL SALVADOR, MEXICO, JAMAICA, AND BRAZIL 5 (2007), *archived at* http://perma.cc/U9J9-KF26.

4. *Id.*

5. Claire O'Niell McKleskey. *Organized Crime Fueling Displacement in Central America,* INSIGHT CRIME (Oct. 17, 2012), http://www.insightcrime.org/news-briefs/organized-crime-displacement-in-central-america, *archived at* http://perma.cc/BS8H-ZLCN.

6. GLOBAL BURDEN OF ARMED VIOLENCE 2011: LETHAL ENCOUNTERS, GENEVA DECLARATION ON ARMED VIOLENCE AND DEVELOPMENT 6 (2011), *archived at* http://perma.cc/H6F8-6VNU.

and prevention efforts with the majority of forces focused on the former.[7] These efforts have not done much to substantially decrease violence, particularly in the northern triangle: Guatemala, Honduras, and El Salvador.[8]

However, in March 2012, El Salvador revealed a new strategy to decrease gang violence: a truce between the countries' main rival factions, Barrio 18 and Mara Salvatrucha, to cease violence and to stop recruiting at schools.[9] This strategy has substantially reduced violence in the country and has won the support of El Salvador's President, the Secretary General, and the Secretary of Multidimensional Security of the Organization of American States (OAS).[10] As part of this truce, the gang members laid down their arms, albeit symbolically, in August 2012 and May 2013.[11] Some in the region, however, disagree with the idea of negotiating with the gangs and doubt the intentions of gang leadership.[12]

This Note briefly reviews the history and development of transnational gangs in Central America. It considers the connection to previous violence in the region and the effects of US immigration policy on the development of gangs. It then delves into the scope of the current problem with the relevant gang violence. This Note reviews the domestic and regional responses to the threat of transnational gangs. It examines various *Mano Dura* policies throughout Central America, as well as prevention programs and regional agreements and strategies. This Note reviews the available information regarding the truce and the developments that are still happening. It explores the role of the El Salvadorian government and the OAS in negotiating the truce. It also discusses the response from various countries in the region regarding negotiation as a strategy for decreasing violence.

The Note then examines the development of international law, and in particular, the ways in which it seeks to restrict and manage violence through International Humanitarian Law (IHL) and International Human Rights Law (IHRL). This Note explores the legal and political limitations of IHL and IHRL in reducing violence in conflicts such as the one in El Salvador. This Note demonstrates how El Salvador's international obligations may inhibit transitional justice and delay the humanitarian goals of the truce. Finally, the Note suggests ways that the international community can support the humanitarian goals embodied in the truce.

---

7. *See infra* Part IV.A.
8. McKleskey, *supra* note 5; *see infra* Part IV.A.
9. *See infra* Part V.
10. *See infra* Part V.
11. *Pandillas salvadorenas entregan armas como parte de una tregua*, *supra* note 1.
12. *See infra* Part V.B.

II. DEFINING TRANSNATIONAL GANGS[13]

Experts continue to debate the meaning of the term "gang."[14] It is generally agreed that gangs have a name, sense of identity, and some degree of organization; are made up of youth; and are involved in delinquent or criminal activity.[15] Gangs are generally distinguishable from organized crime because "they typically lack the hierarchical leadership structure, capital, and manpower required to run a sophisticated criminal enterprise or to penetrate state institutions at high levels."[16]

However, some gangs are more evolved than others. This has led to the classification of gangs as first-, second-, and third-generation.[17] First-generation gangs are turf-oriented, have loose and unsophisticated structures, and engage in opportunistic, localized criminal enterprises.[18] Second-generation gangs are organized for commercial gain, have more centralized leadership, operate in a broader geographic area, and engage in drug trafficking and market protection.[19] According to Max Manwaring, second-generation gangs "also use violence as political interference to negate enforcement efforts directed against them by police and other national and local security organizations."[20] Third-generation gangs maintain elements of first- and second-generation activities, while a select group of members expand the gang's influence.[21] Third-generation gangs expand their connections to other groups and expand their criminal activity to include "smuggling people, body parts, weapons, and cars; associated intimidation, murder, kidnapping and robbery; money laundering; home and community invasion; and other lucrative societal destabilization activities."[22] These third-generation gangs, as a consequence, may develop into sophisticated transnational criminal organizations "with ambitious economic and political agendas."[23] There is some evidence that the

---

13. A note about terms: Gangs in Central America are referred to as *pandillas* or *maras*, and sometimes the terms are used interchangeably. This Note uses these terms interchangeably. This Note also interchangeably uses the English term gang member with the Spanish terms *marero* and *pandillero,* which have the same meaning. "[S]tudies that make a distinction between the two types of Central America gangs generally define *pandillas* as localized groups that have long been present in the region, and *maras* as a more recent phenomenon that has transnational roots." CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., RL34112, GANGS IN CENTRAL AMERICA 4 (2011).

14. *Id.*

15. *Id.*

16. *Id.*

17. MANWARING, *supra* note 3, at 4.

18. MANWARING, *supra* note 3, at 4.

19. MANWARING, *supra* note 3, at 4-5.

20. MANWARING, *supra* note 3, at 5.

21. MANWARING, *supra* note 3, at 5.

22. MANWARING, *supra* note 3, at 5-6.

23. MANWARING, *supra* note 3, at 6.

transnational gangs which operate in the northern triangle are making this transition.[24]

A. The History and Development of Central American Gangs

In the 1970s and 1980s, the Mara Salvatrucha (MS-13) formed in the Rampart and Pico Union neighborhoods of central Los Angeles as Central Americans fled their home countries due to internal conflicts.[25] After their arrival in Los Angeles, "[o]ut of a need for self-protection and to gain control of their new neighborhoods, the criminal elements of Central American newcomers, many of which had prior military and guerrilla training, took up various forms of continuing criminal conspiracies and quickly gained reputations for extreme wantonness and brutality."[26] The MS-13 quickly gained a reputation for employing unusual and violent tactics including the use of machetes in gang attacks.[27] From Los Angeles, the MS-13 spread nationwide.[28] "Although FBI officials have described MS-13 as a 'loosely structured street gang,' it has expanded geographically, and may pose an increasing national and regional security threat as it becomes more organized and sophisticated."[29] In 2004, the National Drug Intelligence Center reported that "the gang was increasing its coordination between chapters in Los Angeles, Washington D.C., Northern Virginia, and New York, perhaps indicating efforts to create a national command structure."[30]

In the 1960s, Barrio 18 (also known as M-18, the 18th Street Gang, and Pandilla 18) was formed by Mexican immigrants in the Rampart section of Los Angeles.[31] They were not accepted by existing Mexican-American gangs.[32] It was the first Hispanic gang to accept members from all races, to recruit members from other states, and to grow its ranks by becoming one of the first multiracial, multiethnic gangs in Los Angeles.[33]

After the 1992 Los Angeles riots, police attributed much of the

---

24. MANWARING, *supra* note 3, at 12.

25. Luz E. Nagle, *Criminal Gangs in Latin America: The Next Great Threat to Regional Security and Stability?*, 14 TEX. HISP. J.L. & POL'Y 7, 10 (2008); CELINDA FRANCO, CONG. RESEARCH SERV., RL34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 3-4 (2007).

26. Nagle, *supra* note 25, at 10.

27. FRANCO, *supra* note 25, at 4.

28. Nagle, *supra* note 25, at 11.

29. CLARE RIBANDO, CONG. RESEARCH SERV., RS22141, GANGS IN CENTRAL AMERICA 2 (2005).

30. FRANCO, *supra* note 25, at 4-5.

31. FRANCO, *supra* note 25, at 4-5.

32. FRANCO, *supra* note 25, at 4-5.

33. FRANCO, *supra* note 25, at 4; RIBANDO, *supra* note 29, at 2.

violence and looting to local gangs.[34] In the years following, California passed strict, new tough-on-crime laws like the "three strikes and you're out" legislation in 1994.[35] The effect of this legislation was a dramatic increase in California's prison population.[36] Additionally, the US Congress passed the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) of 1996, which made it easier to deport criminals.[37] The combination of these legislative changes led to the deportation of thousands of convicted felons to El Salvador.[38] "Between 2000 and 2004, an estimated 20,000 criminals were sent back to Central America."[39] The proliferation of *maras* in Central America is attributable in large part "to a United States immigration and criminal justice policy that deports foreign-born criminal convicts back to their countries of origin following incarceration . . . . [F]or several years the United States has been pouring tens of thousands of criminals, including extremely violent offenders, into Central America's weakest and most failing states."[40] Until recently, rules also prohibited the US government from sharing the returnees' criminal history with the governments of their countries of origin.[41] After deportation, gang members arrive in their countries of origin "as pariahs in places unfamiliar or unknown to them, unwelcome, and with no basis of support to assimilate and to stay out of trouble."[42] It has been observed that a lack of strong familial connections in the region and a lack of fluency in Spanish leaves these individuals isolated and "[r]etaining their gang lifestyle can be their only means of surviving and thriving."[43]

Upon return, deportees introduced California gang culture to their

---

34. MANWARING, *supra* note 3, at 16.

35. MANWARING, *supra* note 3, at 16. "In 1994, California legislators and voters approved a major change in the state's criminal sentencing law, (commonly known as Three Strikes and You're Out). The law was enacted as Chapter 12, Statutes of 1994 (AB 971, Jones) by the Legislature and by the electorate in Proposition 184. As its name suggests, the law requires, among other things, a minimum sentence of 25 years to life for three-time repeat offenders with multiple prior serious or violent felony convictions. The Legislature and voters passed the Three Strikes law after several high profile murders committed by ex-felons raised concern that violent offenders were being released from prison only to commit new, often serious and violent, crimes in the community." *A Primer: Three Strikes—The Impact after More than a Decade*, LEGISLATIVE ANALYST'S OFFICE (Oct. 2005), http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm, *archived at* http://perma.cc/R9KQ-DX24.

36. MANWARING, *supra* note 3, at 16; *A Primer: Three Strikes—The Impact after More than a Decade*, *supra* note 35.

37. MANWARING, *supra* note 3, at 16; SEELKE, *supra* note 13, at 54.

38. MANWARING, *supra* note 3, at 16.

39. RIBANDO, *supra* note 29, at 2.

40. Nagle, *supra* note 25, at 11.

41. MANWARING, *supra* note 3, at 16.

42. Nagle, *supra* note 25, at 11.

43. Nagle, *supra* note 25, at 11-12.

countries of origin, which included, drugs, extortions, car-theft rings, burglaries, and contract killings.[44] "[Local officials] did not have the knowledge, experience, organization, or resources" to deal with these gangs.[45] El Salvador is thought to have been hit the hardest by the gang problem, and is now "captive to the growing influence and violence of gangs."[46] In El Salvador, "widespread proliferation" of firearms and explosives, a result of the civil conflict in the 1980s, has given gangs easier access to weapons, thereby contributing to the gang problem.[47]

B. Current Activity and Geographic Scope of Central American Gangs

In the United States, *mareros* are concentrated in areas with large Central American populations like California, Maryland, New York, Texas, and Virginia, but have also spread to other communities like Lake Worth, Florida.[48] Information from a US gang survey shows "the MS-13 and M-18 gangs have an established presence in Washington, D.C.; Northern Virginia; certain cities in Maryland; Nashville, Tennessee; New York, New York; Houston, Texas; and other rural and urban areas."[49] In Latin America, "*mareros* have a formidable criminal presence in El Salvador, Honduras, Guatemala, and Mexico," and authorities believe that *mareros* are operating to some extent in Canada and Europe.[50]

A 2007 report concluded that "MS-13 and M-18 members in the Washington, D.C. area were not [during the observed period] engaged in a systematic effort to become more involved in organized crime. . . . [T]he members' criminal activity was largely limited to petty theft and neighborhood extortion."[51] However, criminal cases from the late 2000s involving MS-13 defendants "included information and testimony that gang members in Maryland were in telephone contact with other MS-13 members in cities across the country and . . . in El Salvador."[52] There is also evidence that the MS-13 share information and that *clicas*[53] in one area have loaned weapons to *clicas* in other areas.[54] For example, by early 2008, "Salvadoran police had found evidence suggesting that some MS-13 leaders jailed in El Salvador were ordering retaliatory assassinations of individuals

---

44. MANWARING, *supra* note 3, at 167.
45. MANWARING, *supra* note 3, at 167.
46. MANWARING, *supra* note 3, at 16-17.
47. RIBANDO, *supra* note 29, at 2.
48. Nagle, *supra* note 25, at 2.
49. FRANCO, *supra* note 25, at 2.
50. Nagle, *supra* note 25, at 2.
51. FRANCO, *supra* note 25, at 8 (alteration added).
52. FRANCO, *supra* note 25, at 9.
53. This term *clica* (also spelled *clika* or *cliqa*) is similar to the terms *clique* or *set,* as used in English-speaking gangs, and refers to a localized sub-group of a larger gang.
54. FRANCO, *supra* note 25, at 9.

in Northern Virginia, as well as designing plans to unify their *clicas* with those in the United States."[55] Although the picture is still unclear, some researchers maintain "that the MS-13 gang *in some Central American countries* has characteristics of a third-generation gang."[56] Also, "evidence suggests that these gangs are engaged in criminal enterprises normally associated with better organized and more sophisticated crime syndicates."[57] The United Nations Office on Drugs and Crime (UNODC) "has cited country membership totals of some 10,500 in El Salvador, 36,000 in Honduras, and 14,000 in Guatemala."[58] Adam Blackwell, Secretary of Multidimensional Security for the OAS, estimated the number of *mareros* in El Salvador to be around 60,000 at the time of the relevant report, published in 2012.[59]

III. THREAT OF TRANSNATIONAL GANGS TO DOMESTIC AND REGIONAL SECURITY

Both Barrio 18 and MS-13 are known for their brutality, which is sometimes attributed to the groups' roots in the civil conflicts of the 1980s.[60] In a 2005 interview, Frank Flores, a Los Angeles Police Officer assigned to the anti-gang unit, stated that "MS-13 gang members came from 'war-torn countries where . . . killing was a regular occurrence—violence, beating people up, stabbing people, seeing people die[.] They were desensitized[.] Their readiness to commit a violent act was nothing; it was second nature.'"[61] Many of the acts of violence committed by *mareros* demonstrate this desensitization. For example, in Central America, "gang members held up passengers on city buses and burned one bus while it was

---

55. SEELKE, *supra* note 13, at 5.

56. FRANCO, *supra* note 25, at 5 (alteration in original); *see also* SEELKE, *supra* note 13, at 4.

57. FRANCO, *supra* note 25, at 1.

58. SEELKE, *supra* note 13, at 5.

59. José Luis Sanz, *Adam Blackwell, secretario de seguridad multidimensional OEA: "No creo que hubiera otra opción que dialogar con las pandillas"*, EL FARO (Oct. 1, 2012), http://www.elfaro.net/es/201209/noticias/9804/#.UGxorFha3Ns.email, *archived at* http://perma.cc/A8G4-LS7Y.

60. Nagle, *supra* note 25, at 10-11.

61. Nagle, *supra* note 25, at 10-11. According to the document released by the leaders of M-18 and MS-13 regarding the truce, "No one can object that we too are Salvadorians and that we are a social byproduct of the horrible socio-economic policies derived from the models that have been implemented in El Salvador for many years, including sending us to war in the 1980s, a war that we are considered sons of, because the majority of our members lost our fathers in this conflict, others of us are members of homes ripped apart by the effects of the emigration of our fathers and ourselves, to other countries and by the uprooting of being displaced from our places of origin." Los Voceros Nacionales de la Mara Salvatrucha MSX3 y Pandilla 18, *archived at* http://perma.cc/B4WH-VDBF [hereinafter Voceros] (translated by the author).

filled with riders."[62] In 2009, gang members allegedly killed 146 Guatemalan bus drivers.[63]

The level of violence in Central America, and specifically El Salvador, is astounding. According to the Geneva Declaration's 2011 Global Burden of Armed Violence report, El Salvador had more violent deaths per capita than any other country between 2004 and 2009 (the listing includes countries considered active combat zones during this period such as Iraq).[64] While the average homicide rate for the world between 2000 and 2008 was nine per 100,000 inhabitants, the rates in Central America soared to fifty-two, forty-eight, and fifty-eight, for El Salvador, Guatemala, and Honduras respectively in 2008.[65] The Inter-American Development Bank has estimated that in Latin America, violence costs approximately 14.2 percent of gross domestic product.[66] It is hard to say exactly what percentage of this violence is gang related. While Salvadoran police estimate that at least 60 percent of murders committed in 2004 were gang-related,[67] experts argue "although gangs may be more visible than other criminal groups, gang violence is only one part of a broad spectrum of violence in Central America."[68]

Various sources indicate that MS-13 and M-18 are involved in a variety of other criminal enterprises and are connected with various organized criminal elements. The increased intensity of the War on Drugs in Mexico has reportedly led traffickers to use Central America as a transshipment point for US-bound Andean cocaine, with at least 42 percent of that US-bound cocaine stopping in Central America.[69] In part of MS-13's and M-18's criminal network that includes connections throughout the region and in Spain, El Salvador has become a major transshipment point for drug trafficking and human smuggling.[70] Some gang members even serve as "foot soldiers" for more organized drug trafficking organizations in Mexico.[71] The gangs have grown their criminal activities to include: drug and weapons smuggling and distribution, human trafficking and prostitution, kidnapping, assassinations for hire, extortion, protection

62. Randal C. Archibold, *Gangs' Truce Buys El Salvador a Tenuous Peace*, N.Y. TIMES (Aug. 27, 2012), http://www.nytimes.com/2012/08/28/world/americas/in-el-salvador-gang-truce-brings-tenuous-peace.html, http://perma.cc/L5WV-BBRW.

63. SEELKE, *supra* note 13, at 6.

64. GLOBAL BURDEN OF ARMED VIOLENCE 2011: LETHAL ENCOUNTERS, *supra* note 6, at 6.

65. SEELKE, *supra* note 13, at 2.

66. MANWARING, *supra* note 3, at 15.

67. RIBANDO, *supra* note 29, at 1.

68. SEELKE, *supra* note 13, at 5.

69. SEELKE, *supra* note 13, at 3.

70. Nagle, *supra* note 25, at 16.

71. Archibold, *supra* note 62.

racketeering, and larceny.[72]

Although there has been some concern that terrorist groups, like al-Qaeda, could use transnational gangs to gain access to the United States, there does not, at the time of this Note's writing, seem to be any evidence to suggest such a connection.[73] In fact, "analysts have found no links between Central American gangs and Al Qaeda or other terrorist groups."[74] But still, some researchers assert that the MS-13 gang and terrorist groups are similar in that they both have "a propensity for indiscriminate violence, intimidation, [and] coercion [that] transcend[s] borders, and target[s] nation-states."[75]

The parallels between the operations of transnational gangs and terrorist organizations not only leads some to fear the potential for future collaboration, but also raises an important question about what tactics should be used to combat the violence. Some say that the growth of the transnational gangs "poses a significant concern for long-term security and stability in our hemisphere,"[76] and call *mareros* "the perfect storm in terms of an autonomous quasi-fighting force capable of carrying out unspeakable violence against civil societies in the Americas."[77] Because of membership numbers in the tens of thousands and their military grade weapons, "the two gangs are virtual armies that have the power to affect the security of the entire region."[78] Some predict a shift in the status of gangs from "being a scourge of civil society to becom[ing] a serious paramilitary threat to national and regional security, prompting a military response to deteriorating socio-political conditions."[79]

It has been argued that "[l]ike the United States' so-called War against Terror, there may come a point where strong and decisive military measures are necessary to isolate Central America's *mareros* from their sources of sustenance, namely their counterparts in the United States and other non-Latin American [S]tates where *marero* incursions have occurred."[80] Such military action precipitates an "unconventional type of conflict [that] pits nonstate actors (gangs, warlords, drug barons, and/or insurgents) directly against nation-states and requires a relatively effective defense (military) capability."[81] There are five operational-level national security challenges associated with the transnational gang phenomenon: 1)

---

72. Nagle, *supra* note 25, at 11; RIBANDO, *supra* note 29, at 1.
73. FRANCO, *supra* note 25, at 2.
74. SEELKE, *supra* note 13, at 6.
75. FRANCO, *supra* note 25, at 4 (alterations added).
76. Nagle, *supra* note 25, at 8.
77. Nagle, *supra* note 25, at 17.
78. Archibold, *supra* note 62.
79. Nagle, *supra* note 25, at 24 (alteration added).
80. Nagle, *supra* note 25, at 25 (alteration added).
81. MANWARING, *supra* note 3, at 10 (alteration added).

gangs strain government resources, such as police and legal systems; 2) in areas where the government's ability to provide for the public good is challenged by internal corruption, gangs are able to challenge the legitimacy of the state; 3) gangs act in place of the state in ungoverned areas; 4) gangs use violence and coercion and government corruption to gain unfair economic advantages over legitimate businesses and dominate the informal economy; and 5) gangs infiltrate police and NGOs to further their goals.[82]

Accordingly, such conflicts have "no formal declarations or terminations of conflict; no easily identified human foe to attack and defeat; no specific territory to take and hold; no single credible government or political actor with which to deal; and no guarantee that any agreement between or among contending protagonists will be honored" relegating everyone, everywhere, part of the "battle space."[83]

IV. "TRADITIONAL" RESPONSES TO TRANSNATIONAL GANGS

A. Domestic Approaches: Mano Dura y Mano Amiga

In the mid-2000s, El Salvador, Guatemala, and Honduras cracked down on gangs in a set of programs collectively called *Mano Dura* (which translates to *the firm hand* or *heavy-handed*), a program the effectiveness of which has been called into question.[84] Since then, countries have also incorporated more preventative tactics often termed *Mano Amiga* (which translates to *the friendly hand*).[85] *Mano Dura* approaches usually increased sentences for "gang membership or gang-related crime" and involved the mass incarceration of youth for illicit association.[86] However, "[o]ne expert found that homicides committed by young people in the three nations increased by forty percent after the new policies were put into place."[87] These policies have played out differently in different countries.[88]

1. Honduras

In 2003, Honduras passed legislation establishing a maximum twelve-year prison sentence for gang membership and increased that penalty to thirty years in 2004.[89] Honduras, which only has around 8,000 police

82. MANWARING, *supra* note 3, at 10.
83. MANWARING, *supra* note 3, at 8.
84. Nagle, *supra* note 25, at 14; SEELKE, *supra* note 13, at 7.
85. MANWARING, *supra* note 3, at 21-22.
86. SEELKE, *supra* note 13, at 10.
87. Nagle, *supra* note 25, at 14.
88. Nagle, *supra* note 25, at 14.
89. RIBANDO, *supra* note 29, at 3.

officers (the lowest per-capita ratio in Latin America), in 2002 and 2006 attempted to combine military, police, and private armed security forces in an attempt to reduce gang violence.[90] Although the crackdown initially reduced crime (an 80-percent decline in kidnapping and a 60-percent decline in youth gang violence) and was popular among the people, it raised human rights concerns.[91]

The US State Department's February 2005 Human Rights Report said that "death squads" had been formed to target youth gang members; in March 2005, the Honduran government announced an investigation into the allegations.[92] There are also concerns about prison overcrowding.[93] In May 2004, 104 inmates, many of them gang members, died in a fire in the San Pedro Sula prison.[94] In February 2012, more than 300 inmates perished in a fire at the Comayagua prison.[95]

2. El Salvador

In 2003, El Salvador's Congress passed its first *Mano Dura* law, but it was later declared unconstitutional by the Supreme Court of Justice in 2004.[96] In July 2004, El Salvador's Congress unanimously approved President Tony Saca's *Super Mano Dura* anti-gang legislation, which included "reforms stiffening the penalty for gang membership to up to five years in prison and for gang leadership to nine years."[97] In February 2005, El Salvador's Legislative Assembly restricted gun ownership, especially for youths, to enhance *Mano Dura* measures[98] "and began a complementary effort of prevention and rehabilitation called *Mano Amiga*."[99] While these laws provided some protections for accused minors, it also enhanced police power to search and arrest gang members.[100] At first, it appeared the reforms were working. Approximately 60,000 young Salvadorans were incarcerated during the first three years of the program[101] "including some

90. Nagle, *supra* note 25, at 14.

91. RIBANDO, *supra* note 29, at 3.

92. Ley Anti-Maras ["Anti-Gangs Act"], No. 158/2003, art. 49 (2003) (El Sal.); RIBANDO, *supra* note 29, at 3.

93. RIBANDO, *supra* note 29, at 3.

94. RIBANDO, *supra* note 29, at 3.

95. Mariano Castillo & Elvin Sandoval, *More than 300 Killed in Honduras Prison Fire*, CNN (Feb. 16, 2012, 1:15 AM), http://www.cnn.com/2012/02/15/world/americas/honduras-fire-deaths/index.html, *archived at* http://perma.cc/8HA2-ULKL.

96. SEELKE, *supra* note 13, at 10.

97. RIBANDO, *supra* note 29, at 3; *see also* SEELKE, *supra* note 13, at 10.

98. RIBANDO, *supra* note 29, at 3

99. MANWARING, *supra* note 3, at 21-22.

100. SEELKE, *supra* note 13, at 10.

101. Nagle, *supra* note 25, at 15.

14,000 youth in El Salvador between mid-2004 and late 2005,"[102] and "[t]he Salvadoran government reported that the gang legislation led to a fourteen percent drop in murders in 2004."[103]

However, early benefits of *Mano Dura* turned to disappointments, with an estimated 10,000 of 14,000 suspects arrested in 2005 being released due to lack of evidence.[104] Some wrongly accused youth joined gangs while in prison.[105] In 2006, the Salvadoran Research Foundation for the Application of the Law found that *Mano Dura* policies had "actually increased gang-related violence, and ha[d] further eroded public confidence in the PNC [Salvadorian Police force], which [was] increasingly viewed as an inherent violator of human rights."[106] The United Nations, concerned about possible human rights abuses, said that "the tough measures only strengthened the gangs' resolve and forced continuing criminal enterprises and acts of violence, such as burglary, kidnapping, and recently, massive extortion, to be directed from within prison walls."[107] Non-profit organizations in El Salvador have asked that the government turn its attention away from *Mano Dura* policies and toward the rehabilitation of gang members.[108] The overcrowding in prisons and the resulting inter-gang violence led to the death of many inmates.[109] There are also reports of extrajudicial killings of youth, especially suspected gang members, or recent returnees, by groups of vigilantes.[110] These attacks are noted by the leaders of MS-13 and M-18 in the document they released regarding the truce, which pled the request "that [members] aren't discriminated against and that we aren't oppressed for the simple fact that we are tattooed, without having committed any type of crime."[111] Ex-gang members report that employers will not hire them.[112] In response to *Mano Dura,* gangs have changed their behavior, such as avoiding visible tattooing, to avoid detection.[113] The new president of El Salvador, Mauricio Funes, "has increased funding for prevention programs to roughly 14% of the Ministry of Security's budget (from a historic average of just over 1%)."[114]

---

102. SEELKE, *supra* note 13, at 11.
103. RIBANDO, *supra* note 29, at 3.
104. SEELKE, *supra* note 13, at 11.
105. SEELKE, *supra* note 13, at 11.
106. Nagle, *supra* note 25, at 15 (internal quotation marks omitted) (alterations added).
107. Nagle, *supra* note 25, at 15.
108. RIBANDO, *supra* note 29, at 3-4.
109. SEELKE, *supra* note 13, at 8.
110. SEELKE, *supra* note 13, at 11.
111. Voceros, *supra* note 61 (translated by the author).
112. SEELKE, *supra* note 13, at 7.
113. SEELKE, *supra* note 13, at 7.
114. SEELKE, *supra* note 13, at 12.

3. Other Countries' Initiatives

Panamanian President Martin Torrijos initiated *Mano Amiga* in September 2004.[115] It provides "positive alternatives," like theatre or sports, to gangs for at-risk youth aged fourteen to seventeen.[116] The program is supported by nongovernmental organizations (NGOs) and provides services to more than 10,000 youth.[117] Also, the Ministry of Social Development administers job training and rehabilitation services to former gang members.[118] Panama was approved for a $22.7 million loan by the Inter-American Development Bank (IDB) to fund these and other programs aimed at preventing youth violence.[119]

Nicaragua also adopted a youth crime prevention strategy focused on family, school, and community intervention.[120] The Ministry of the Interior, supported by funding from the IDB, has a program to target at-risk youth in eleven different municipalities.[121] Costa Rica is also known to favor the "preventive and rehabilitation oriented approach."[122]

Guatemala introduced *Mano Dura* legislation in 2003, which never passed, but the Guatemalan government has executed "periodic law enforcement operations to round up suspected gang members."[123] Concerned about past abuses in Guatemala, many human rights organizations "oppose any measures that would strengthen law enforcement's power to fight the gangs."[124]

In June 2010, Belize became the first country to try a direct approach by negotiating a safe zone truce with localized criminal gangs, in exchange for jobs programs for gang members and provides avenues for mediation of conflicts.[125] At the end of 2012, Belize announced that the program would come to an end due to a lack of funding.[126] Many critics of the program argued that it had strengthened the gangs by providing them with funding

115. RIBANDO, *supra* note 29, at 4.
116. RIBANDO, *supra* note 29, at 4.
117. RIBANDO, *supra* note 29, at 4.
118. SEELKE, *supra* note 13, at 11.
119. SEELKE, *supra* note 13, at 11-12.
120. RIBANDO, *supra* note 29, at 4.
121. SEELKE, *supra* note 13, at 11.
122. SEELKE, *supra* note 13, at 11-12.
123. SEELKE, *supra* note 13, at 10.
124. RIBANDO, *supra* note 29, at 4.
125. Mary Vasquez, *Restore Belize Keeping Gang Truce with Employment for 200*, CHANNEL5BELIZE.COM (May 2, 2012), http://edition.channel5belize.com/archives/69903, *archived at* http://perma.cc/UR26-MVP3.
126. Jeremy McDermott, *Money Runs Out for Belize Gang Truce*, INSIGHT CRIME (Dec. 24, 2012), http://www.insightcrime.org/news-briefs/money-runs-out-for-belize-gang-truce, *archived at* http://perma.cc/55MP-82AF.

and had done little to prevent violence in the long term.[127]

B. Multilateral/Regional Approaches: Suppression and Prevention

There have been a number of regional, bilateral, and multilateral measures to address the issues presented by transnational gangs. In March 2005, the presidents of El Salvador and Guatemala agreed to set up a joint security force to address gang activity along their border.[128] In April 2005, at a meeting in Honduras, Central American heads of state discussed "coordinating security and information-sharing initiatives to fight the gangs."[129] Another regional example includes the signing of a multilateral agreement by Belize, Guatemala, and Mexico to combat "narco-terrorism and criminal gangs."[130]

1. US Efforts

The United States has worked to build several bilateral or multilateral solutions to the gang problem on the North American continent. In 2004, the FBI established an MS-13 National Gang Task Force to coordinate local, state, and federal investigations.[131] On February 23, 2005, it announced the creation of a liaison office in San Salvador to coordinate regional information-sharing and anti-gang efforts.[132] In October 2007, the Bush Administration proposed the Mérida Initiative, an anti-crime and counterdrug program for Mexico and Central America.[133]

In 2010, the funding from the Merida Initiative – Central America was directed into a separate program, the Central America Regional Security Initiative (CARSI).[134] The primary goals of CARSI are:

> 1. Create safe streets for the citizens in the region; 2. Disrupt the movement of criminals and contraband within and between the nations of Central America; 3. Support the development of strong, capable, and accountable Central American governments; 4. Re-establish effective state presence and security in communities at risk; and, 5. Foster enhanced levels of security and rule of law coordination

127. *Id.*
128. RIBANDO, *supra* note 29, at 4.
129. RIBANDO, *supra* note 29, at 4.
130. MANWARING, *supra* note 3, at 15 (internal quotation marks omitted).
131. FRANCO, *supra* note 25, at 12.
132. RIBANDO, *supra* note 29, at 5.
133. SEELKE, *supra* note 13, at 15.
134. SEELKE, *supra* note 13, at 15.

and cooperation between the nations of the region.[135]

From 2008 to 2011, the United States gave $361.5 million to Central America via the Merida Initiative and CARSI.[136] For fiscal year 2012, Congress approved an additional $105 million for CARSI.[137] Although the idea behind CARSI was to combine suppressive and preventative measures, "the majority of the money . . . is allocated for security forces," which comprises 73 percent, and not social programs (only 27 percent of funds).[138]

The US State Department also offers the International Law Enforcement Academy (ILEA) in San Salvador, which provides training and assistance to Central American law enforcement officials, and "established a model police precinct in Villanueva, Guatemala."[139] "In January 2008, INL sent a Regional Gang Advisor to El Salvador to coordinate its Central American gang programs."[140] The US Agency for International Development (USAID) has funded several programs including one program in partnership with the Central American Integration System (SICA), the Regional Youth Alliance USAID-SICA, which seeks to provide funding to NGOs in targeted communities to support community leaders and youth programs, along with other preventative programming.[141]

2. The Role of Intergovernmental Organizations

Several Intergovernmental Organizations have addressed the issues related to transnational gangs in Central America. SICA has allowed Central American leaders and officials to meet regularly, "often accompanied by their U.S. and Mexican counterparts, to discuss ways to

---

135. SEELKE, *supra* note 13, at 15-16.

136. *Central American Regional Security Initiative (CARSI),* INSIGHT CRIME (Oct. 18, 2011), http://www.insightcrime.org/security/central-america-regional-security-initiative, *archived at* http://perma.cc/E8HT-AVGC.

137. *Id.*

138. *Id.* Key programs funded through CARSI/Merida Initiative include: Central American Fingerprinting Exploitation (CAFÉ) ("a criminal file/fingerprint initiative that has incorporated thousands of finger prints from gang members from Mexico, El Salvador, Belize, Honduras, and Guatemala"); Transnational Anti-Gang (TAG) Units (a program that creates "vetted police units that work with FBI agents stationed in San Salvador on investigateing gang-related cases"); Central American Law Enforcement Exchange (CALEE) ("a joint FBI/[International Narcotics and Law Enforcement Affairs] program that brings together law enforcement officials from Central America and from several large US cities to share information"); and Repatriation-Criminal History Information Program (CHIP) (a joint FBI/ [U.S. Immigration and Customs Enforcement (ICE)] program to provide more complete criminal history information on US deportees to Central American law enforcement officials"). SEELKE, *supra* note 13, at 18.

139. SEELKE, *supra* note 13, at 17.

140. SEELKE, *supra* note 13, at 17.

141. SEELKE, *supra* note 13, at 18-19.

coordinate security and information sharing" regarding gangs.[142] This cooperation led to a regional security plan that was adopted in 2007.[143] In the plan, the leaders agreed "to designate transnational gang liaison offices in each country" to collect and share information, conduct investigations, and build a regional database on gangs.[144]

On June 5, 2007, the OAS General Assembly passed a resolution to "promote hemispheric cooperation in dealing with criminal gangs;" then on January 12, 2008, the OAS Permanent Council held a special session about the problem of gangs.[145] A "Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs" was developed by the Working Group to Prepare a Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs.[146]

Formed in 2000, the Inter-American Coalition for the Prevention of Violence (IACPV) is a multilateral group that promotes preventative means of combating crime and gangs in the region, but the group has been relatively inactive in recent years.[147]

The United Nations Development Programme (UNDP) "has supported small arms control; police reform; violence reduction; and disarmament, demobilization, and reintegration programs in Central America," and "conducted research projects on the costs of violence in particular countries and published a comprehensive regional study on security challenges facing Central America."[148] Also, UNODC has highlighted the role of transnational gangs in the Americas in several reports.[149]

V. THE PEACE PROCESS IN EL SALVADOR: A NEW APPROACH TO DECREASING VIOLENCE

In spite of a multitude of domestic and regional efforts to suppress gang activity and to prevent gang membership, the homicide rate in El Salvador increased from forty per 100,000 inhabitants at the inception of *Mano Dura* in 2003, to fifty-two per 100,000 inhabitants in 2008.[150] In

142. SEELKE, *supra* note 13, at 13.

143. SEELKE, *supra* note 13, at 13.

144. SEELKE, *supra* note 13, at 13.

145. SEELKE, *supra* note 13, at 14.

146. SEELKE, *supra* note 13, at 14; Permanent Council of the Org. of American States Draft Res., Regional Strategy to Promote Inter-American Cooperation in Dealing with Criminal Gangs, OEA/Ser.G CSH/GT/PD-35/10 rev. 3 (May 11, 2010).

147. *Id.*

148. *Id.*

149. *E.g.*, U.N. OFFICE OF DRUGS & CRIME, TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT 21-30 (2012), *archived at* http://perma.cc/BW9U-W2MY.

150. *See* SEELKE, *supra* note 13, at 2.

March of 2012, mediators held a press conference to announce that El Salvador's two largest gangs, MS-13 and M-18, had reached a truce.[151] The truce was negotiated between gang leaders from the two groups in prison with the help of mediators Raúl Mijango, a former lawmaker, and Msgr. Fabio Colindres, the military chaplain.[152] By March, the two groups had made arrangements to call an end to violence and the recruiting of children.[153] At first, the government was reluctant to acknowledge its part in the negotiations, but eventually it became clear that the Security Ministry had been involved in the negotiations and that the truce was, to some degree, aided by the government's agreement to move several prisoners to less restrictive facilities.[154] According to the Salvadorian Security Ministry, the truce led to a 32 percent drop in homicides in the first half of 2012, a 50 percent reduction in kidnappings, and a 10 percent decline in extortion.[155] According to official national police statistics, the number of homicides decreased 41 percent in 2012 compared to 2011.[156] "The truce period also brought about El Salvador's first day free of murder in three years."[157]

After announcing the truce, Raul Mijango released a document, later authenticated by gang members, stating the position of the gangs.[158] The document says that the group does not "wish to keep making war," and that

> Since last year we have begun internally a deep process of reflection and analysis of the serious and pressing problems facing our country, of which we have been part . . . after 20 years we have been able to reach an agreement between the two rival gangs where we have managed . . . to significantly reduce the murders in the country, and, in a gesture of goodwill, to cancel all actions that include attacks against soldiers, police and guards.[159]

The document also made it clear that the leaders consider this process

---

151. Sanz, *supra* note 59.

152. *See* Archibold, *supra* note 62.

153. Archibold, *supra* note 62.

154. Archibold, *supra* note 62.

155. Archibold, *supra* note 62.

156. Edward Fox, *El Salvador Homicides Fell over 40% in 2012*, INSIGHT CRIME (Jan. 4, 2013), http://www.insightcrime.org/news-briefs/el-salvador-homicides-fell-over-40-percent-2012, *archived at* http://perma.cc/9FZJ-7GQP.

157. Patrick Corcoran, *Do El Salvador Killings Reflect Danger to the Gangland Truce?*, INSIGHT CRIME (Aug. 23, 2012), http://www.insightcrime.org/news-analysis/el-salvador-mara-salvatrucha-killings-truce-gangs, http://perma.cc/K5EU-LNVW.

158. Hannah Stone, *El Salvador Gangs Confirm Truce*, INSIGHT CRIME (Mar. 23, 2012), http://www.insightcrime.org/news-briefs/el-salvador-gangs-confirm-truce, http://perma.cc/9EWV-2H9V.

159. *Id.*

one that is not just about cessation of violence, but one that is also about solving some of the lingering social problems which push their members into violent lifestyles:

> We are people who play with life, principally with our own lives because we have nothing to lose . . . . It is necessary to understand once and for all that we are a social phenomenon and that the war that we have seen ourselves as obligated to fight has socioeconomic causes and more than anything its solutions is not only legal and by repression, but also by social and economic means.[160]

They also asked for the support of Salvadorians generally: "Give us the opportunity, support our guides, and don't give credit to obtuse positions that as in the past, always opposed and boycotted rational and peaceful solutions and provoked the extension of a conflict that caused tens of thousands of deaths."[161] The truce has been compared by some gang members to the one that halted the twelve-year civil war in 1992.[162] Ludwig Rivera, a Barrio 18 leader, said: "It's not that the truce is weak. We feel it is strong. But the lack of involvement of the authorities and the public could make it weak. They all think we are animals, but we have rights and we are taking a step, so they should take a step."[163]

A. Phase Two: Peace Zones

In November 2012, the mediators of the negotiations in El Salvador announced a second phase of the truce that would establish peace zones, where particular municipalities would be designated as "special zones of peace" with gangs agreeing to non-aggression and a stop to extortion, kidnapping, theft, and murder.[164] According to the negotiators' proposal, these peace zones would include the following: a non-aggression pact between gangs; an obligation to reduce and eradicate criminal activity including extortion; a voluntary disarmament of gangs; the establishment of community collectives made up of gang members that would work on development in the community; a delegation of Policía Nacional Civil (PNC) consisting mostly of community police; an end to the police tactics of gang roundups and night raids and to policies that criminalize gang

160. Voceros, *supra* note 61 (translated by the author).
161. Archibold, *supra* note 62.
162. Archibold, *supra* note 62.
163. Archibold, *supra* note 62.
164. Hanna Stone, *Next Phase of El Salvador Gang Truce: Peace Zones*, INSIGHT CRIME (Nov. 23, 2012), http://www.insightcrime.org/news-briefs/next-phase-salvador-gang-truce-peace-zones, *archived at* http://perma.cc/Q3KG-5RBW.

identity; cooperation between government and business to improve the job market for youth, including gang members that have left behind crime; a prioritization of mental health campaigns and cultural education by the government; and a local citizen crime-watch.[165] In early December 2012, the leaders of MS-13, Barrio 18, and three smaller street gangs (Mao Mao, Mirada Locos, and La Maquina) agreed to the terms of the proposal, submitted a list of ten municipalities where they would be willing to have peace zones and ordered members in those cities to begin disarming.[166] However, President Funes refused to accept the terms of the proposal, which included a repeal of the 2009 anti-mara law, and an end to night raids.[167] While defending the 2009 anti-mara law as a "valid instrument of the law, which has shown efficacy," he also said that it could be made more "efficient," leaving the door open for further negotiations about the amendment of the statute.[168] In January, the first Peace Zone was instituted in Ilopango, a town near the capital.[169] In February, Defense Minister Alito Benitez announced that the military would also withdraw from peace zones, so that they could focus on crime in other areas.[170]

While the peace zone program appeared to be working, the truce has not completely stopped the violence in these communities. In September 2013, in Ilopango, four members of the Barrio 18 were killed while gang leadership met for peace talks nearby.[171] The leaders of MS-13 and Barrio 18, along with the mayor of Ilopango all claimed that the murders were not carried out by gang members but rather by those who wished to undermine

---

165. Fabio Colindres & Raul Mijango, *Pronunciamiento a la Nación*, (Nov. 22, 2012), http://www.lapagina.com.sv/userfiles/image/Ernesto%20V%C3%A1squez/ZU1860.jpg, *archived at* http://perma.cc/57SD-V44U (translated by the author).

166. Elyssa Pachico, *El Salvador Gangs Accept Proposal to Create 'Peace Zones'*, INSIGHT CRIME (Dec. 5, 2012), http://www.insightcrime.org/news-briefs/el-salvador-gangs-accept-peace-zones, http://perma.cc/8P8J-QQE9; Los Voceros Nacionales de las Pandillas: MSX3, Barrio 18, Mao-Mao, Maquina y Mirada Locos; A Los Facilitadores del Proceso de Tregua y de Paz, al Pueblo Salvadoreño y demas Pueblos del Mundo (2012), *archived at* http://perma.cc/3M9S-PFMB (translated by the author).

167. James Bargent, *El Salvador President Open to Reform But Not Repeal of Anti-Gang Law*, INSIGHT CRIME (Dec. 18, 2012), http://www.insightcrime.org/news-briefs/el-salvador-funes-repeal-anti-gang-law, http://perma.cc/8M4B-GD3V.

168. *Id.*

169. Miriam Wells, *El Salvador 'Peace Zone' Launched in Second Phase of Gang Truce*, INSIGHT CRIME (Jan. 23, 2013), http://www.insightcrime.org/news-analysis/el-salvador-peace-zone-launched-in-second-phase-of-gang-truce, *archived at* http://perma.cc/958C-MSDV.

170. Elyssa Pachico, *Military to Withdraw from El Salvador 'Peace Zones'*, INSIGHT CRIME (Feb. 4, 2013), http://www.insightcrime.org/news-briefs/military-to-withdraw-from-el-salvador-peace-zones, *archived at* http://perma.cc/D4B9-NZ6U.

171. Charles Parkison, *El Salvador Gang Truce Shaken by 'Peace Zone' Murders*, INSIGHT CRIME (Sept. 9, 2013), http://www.insightcrime.org/news-briefs/el-salvador-gang-truce-rocked-by-peace-zone-murders, *archived at* http://perma.cc/6E7A-ETEU.

the truce—even suggesting that perhaps the murders had been executed by Salvadorian security forces.[172] Salvadorian police denied this claim.[173] Regardless of who was responsible, these events have "cast a shadow" over the peace process.[174]

B. Strain on the Truce

These "shadows" have haunted the peace process in El Salvador from the beginning, with critics citing continued violence and extortion as signs of bad faith negotiation by the gangs and as signals that the truce is a sham.[175] The truce has not totally stopped violence among gang members. In September 2012, two bosses of MS-13 were killed by underlings who sought to enforce the truce by preventing the bosses from killing rival gang members.[176] Critics of the gang truce have also claimed that some murders have been in retaliation against those in El Salvador who have spoken out against the truce.[177] According to a recent report by the International Assessment and Strategy Center, gang members who opposed the truce may have been murdered to silence dissent.[178] Critics explain the lower homicide rate has not resulted from an actual reduction in violence, but a shift from open killing in the street to "disappearance."[179] These accusations are difficult to substantiate because of the government's poor tracking of statistics in cases of disappearance.[180] However, such theories have been supported recently by the increase in the number of mass graves, and the number of reported disappearances in the first months of 2013.[181] However,

---

172. *Id.*

173. *Id.*

174. *Id.*

175. *See id*; James Nye, *Inside El Salvador's Secretive Prison Pits Where Notorious Gangs are Crammed Together like Livestock in Cells the Size of a Shed*, DAILY MAIL (Aug. 29, 2013), http://www.dailymail.co.uk/news/article-2405792/Inside-secretive-prison-pits-El-Salvadors-notorious-gangs-crammed-like-livestock.html, *archived at* http://perma.cc/MTP4-22HS.

176. Corcoran, *supra* note 157.

177. Marguerite Cawley, *Opponents of El Salvador Gang Truce Facing Payback Killings*, INSIGHT CRIME (Mar. 6, 2013), http://www.insightcrime.org/news-briefs/opponents-of-el-salvador-gang-truce-facing-pay-back-killings, *archived at* http://perma.cc/5KKD-HPCJ; DOUGLAS FARAH & PAMELA PHILLIPS LUM, CENTRAL AMERICAN GANGS AND TRANSNATIONAL CRIMINAL ORGANIZATIONS: THE CHANGING RELATIONSHIPS IN A TIME OF TURMOIL 25 (2013), *archived at* http://perma.cc/MN5L-TR6K.

178. Marguerite Cawley, *supra*.

179. Hannah Stone, *The Murky Question of Disappearance in El Salvador: An El Faro Investigation*, INSIGHT CRIME (Jan. 25, 2013), http://www.insightcrime.org/news-analysis/the-murky-question-of-disappearances-in-el-salvador-an-el-faro-investigation, *archived at* http://perma.cc/E2ZY-URWE.

180. *Id.*

181. James Bargent, *Disappearances, Clandestine Graves on the Rise in El Salvador*,

it is difficult to tell if this is due to an actual increase or an improvement in the government's tracking methods made under political pressure of those opposed to the truce.[182] A recent analysis of data regarding gang violence in individual municipalities in El Salvador illustrates the complexities in understanding the reduction in violence in El Salvador.[183] This data shows that while homicides have decreased overall, they have increased in 30 percent of municipalities.[184] Another recent development is that a higher percentage of homicides are now being attributed to gangs, although the methods for attributing homicides to gangs versus non-gangs are murky.[185] However, it is important to recall that the current homicide rate is still far below what it was preceding the truce. When comparing the first seven months of the truce to the second seven months of the truce, there was actually a decrease in the overall number of homicides.[186] Recent reports have shown that the majority of the more than 500 weapons handed over by gangs as part of the truce were not in working order.[187] Those who oppose the truce say that this is evidence of bad faith by the gangs.[188]

While the truce is still fully in effect, the news regarding developments throughout 2013 were mixed in large part due to the political climate in El Salvador as the presidential election approached. According to a public opinion poll conducted by La Universidad Technologica de El Salvador, 47 percent of Salvadorians believe that the gangs benefit most from the truce.[189] In the same survey, only 16 percent of respondents indicated the general population benefited the most, 8.7 percent stated that the political parties benefited the most, and 13.3 percent that the government benefited most.[190] Sixty-eight percent of respondents thought that the truce was for political ends, and 50 percent thought it had not

---

INSIGHT CRIME (Mar. 8, 2013), http://www.insightcrime.org/news-briefs/disappearances-clandestine-graves-rise-el-salvador, *archived at* http://perma.cc/7JN4-2MJ4.

182. *Id.*

183. Juan Carlos Garzon, *What Does El Salvador's Homicide Distribution Say about the Gang Truce?*, INSIGHT CRIME (July 18, 2013), http://www.insightcrime.org/news-analysis/what-does-el-salvador-homicide-distribution-say-about-the-truce, *archived at* http://perma.cc/X5T3-CSQ7.

184. *Id.*

185. *Id.*

186. Juan Carlos Garzon, *How to Strengthen the Fragile Gang Truce in El Salvador*, INSIGHT CRIME (July 18, 2013), http://www.insightcrime.org/news-analysis/el-salvador-homicides-gang-truce-breakdown, *archived at* http://perma.cc/J2MX-CDDY.

187. Jeremy McDermott, *Weapons Surrendered by El Salvador's Maras Useless*, INSIGHT CRIME (Aug. 8, 2013), http://www.insightcrime.org/news-briefs/weapons-surrendered-el-salvador-maras-useless, *archived at* http://perma.cc/L3YH-6H7J.

188. *Id.*

189. CENTRO DE INVESTIGACIÓN DE LA OPINIÓN PÚBLICA SALVADOREÑA, EVALUACIÓN DE LA TREGUA ENTRE PANDILLAS, RESULTADOS DE LA ENCUESTA LVIII DE OPINIÓN PUBLICA 3 (2013), *archived at* http://perma.cc/N5LR-BACR.

190. *Id.* at 3.

produced any results.[191] In a poll conducted by the Public Opinion Institute, when asked if the gang truce had reduced crime, 42 percent of respondents said "not at all," 30 percent said only a "little," and 10 percent responded, "a lot."[192] The most negative views of the truce's impact are held by "lower-middle," "working class," and "marginal" social groups.[193] Additionally, an indication of the political nature of the gang truce is that "those with the most negative opinions are members of the Grand Alliance for National Unity (GANA) and the Nationalist Republican Alliance (ARENA) parties—that is to say, the opposition parties."[194]

Many politicians supportive of the truce have found themselves caught in the political crosshairs as election season heats up. Some government officials and legislators have criticized and demanded investigation into truce broker and former Congressman Raul Mijango.[195] Additionally the El Salvadorian Attorney General has accused former Minister of Security David Munguia Payes of ordering a halt to security operations against fourteen gang structures in San Salvador as part of the truce.[196] The new Security Minister, Ricardo Perdomo, has been critical of the results of the truce, citing it as a cause of expansions of narco-trafficking in the country among other concerns.[197] When asked what accounts for the differences in position between himself and his predecessor, Perdomo said that it was because President Funes had instructed him to "conform to reality."[198] However, in October 2013, a former government-member-turned-opposition-party-member accused Minister Perdomo of taking actions supporting the truce—such as letting gang members leave prison to participate in a meeting of a local religious sect and to answer questions about the truce.[199] Funes, nearing the end of

---

191. *Id.* at 4.

192. ENCUESTA DE EVALUACIÓN DEL CUARTO AÑO DE GOBIERNO DE MAURICIO FUNES, ASEMBLEA LEGISLATIVA, Y ALCALDÍAS 49 (2013), *archived at* http://perma.cc/D97F-BWCX.

193. Garzon, *supra* note 186.

194. Garzon, *supra* note 186.

195. Marguerite Cawley, *El Salvador Politicians Demand Investigation into Truce Mediator*, INSIGHT CRIME (July 5, 2013), http://www.insightcrime.org/news-briefs/el-salvador-politicians-order-investigation-into-truce-mediator, *archived at* http://perma.cc/FR8Y-EJ54.

196. James Bargent, *Ex-Minister Accused of Interfering in El Salvador Anti-Gang Ops*, INSIGHT CRIME (July 18, 2013), http://www.insightcrime.org/news-briefs/ex-minister-accused-of-interfering-in-anti-gang-ops-in-el-salvador, *archived at* http://perma.cc/4MSW-SSTQ.

197. Marguerite Cawley, *El Salvador Gangs Using Truce to Strengthen Drug Ties: Official*, INSIGHT CRIME (July 19, 2013), http://www.insightcrime.org/news-briefs/el-salvador-gangs-using-truce-to-strengthen-drug-ties-security-minister, *archived at* http://perma.cc/BEJ6-YEJ6.

198. *Id.*

199. Charles Parkinson, *Prisons Probe Sparks Political Spat over El Salvador Truce*, INSIGHT CRIME (Oct. 8, 2013) http://www.insightcrime.org/news-briefs/prisons-probe-

his presidency, has been ambivalent about the truce, at times showing support at other times being critical. While his administration acknowledged involvement in the truce, Funes never acknowledged personal involvement.[200]

In May, the Constitutional Chamber of the Supreme Court of Justice removed Minister Munguia Payes from his post finding that the post should be held by a civilian.[201] With the removal of Payes, the murder rate began to rise,[202] leading to speculation that the gangs were responding with violence for removal of their strongest governmental ally.[203] This belief was further supported by statements made by the truce broker Raul Mijango, which indicated that the increase in violence was in retaliation for restrictions placed on imprisoned gang members by new Security Minister Ricardo Perdomo.[204] The gangs' official position according to a press conference and subsequent press release is that they intend to maintain the conditions of the truce if the new Security Ministry officials renew the commitments of the outgoing minister, but they warn that the Supreme Court decision "puts the security of Salvadorians at risk."[205]

These new developments have led some to question the viability of the truce when the negotiating position of the gangs is based entirely on violence. Florida International University Professor of International Relations, Jose Miguel Cruz, has noted that in order for the gangs to continue to wield negotiating power, they rely on the existence of violence, which is the very thing the terms of the truce aim to eradicate.[206] Others have criticized the truce because of the position it puts the government in. While gangs have agreed to reduce violence, extortion continues until they have legitimate alternatives, thus creating a catch-22 for the government: "[T]he gangs cannot be permitted to continue carrying out criminal activities, but if law enforcement continues to pursue them with the hardline 'mano dura' (iron fist) policies previously in place, it may derail the whole

---

sparks-political-spat-over-el-salvador-truce, *archived at* http://perma.cc/CY7T-EZUA.

200. Oscar Martinez, *Making a Deal with Murderers*, N.Y. TIMES (Oct. 5, 2013), http://www.nytimes.com/2013/10/06/opinion/sunday/making-a-deal-with-murderers.html?pagewanted=all&_r=0, *archived at* http://perma.cc/W6MX-6PFL.

201. *Id.*

202. *Id.*

203. *Id.*

204. Cawley, *supra* note 197.

205. Hector Silva Avalos & Steve Dudley, *Exit of El Salvador Security Minister Puts Truce at Risk*, INSIGHT CRIME (May 20, 2013), http://www.insightcrime.org/news-analysis/exit-of-el-salvador-security-minister-puts-gang-truce-at-risk, http://perma.cc/XU7H-QUKT.

206. Tomás Guevara, *José Miguel Cruz: "Las Pandillas Son las que Mandan; Se Sienten Empoderados"*, ELSALVADOR.COM (July 9, 2013), http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idArt=8027764&idCat=47859, *archived at* http://perma.cc/PCS3-XULQ.

process."[207]

In spite of the mounting trouble surrounding the truce, the *maras* remain committed. According to a statement released by the gangs in September 2013, their commitment to the truce was unbreakable.[208] The statement also emphasized that the *mareros*, who planned to vote, were watching the elections closely and evaluating each candidate's plan for public security.[209]

C. Blessing of the OAS

In July 2012, gang leaders sat down with José Miguel Insulza, the Secretary General of the Organization of American States.[210] He "called the truce a promising turn in stemming the tide of violence in Central America."[211] There was also a symbolic laying down of arms.[212] Insulza said, "[i]f the presence of the O.A.S. secretary general helps in this peace proposal, I will be here."[213] In July 2012 Insulza announced that the O.A.S. would serve as guarantor of the peace process.[214] Adam Blackwell, O.A.S. Secretary of Multidimensional Security, himself admitted to his involvement as early as December 2011 in strategic planning that ultimately brought the gangs to the table.[215] In spite of criticism, Blackwell has given the truce his full support and plans to move forward with the formation of a technical committee to help formalize the process as it moves forward and to potentially produce documents and more formal agreements.[216] Blackwell was also present at the laying down of arms in May 2013.[217] The OAS again evaluated the progress in the peace process in September 2013.[218]

D. Reaction by States in the Region

Countries in the region have expressed differing opinions about the

---

207. Bargent, *supra* note 196.

208. Voceros Nacionales de las Pandillas: MSX3, Barrio 18, Mao-Mao, Maquina, Mirada Locos 13, Retirados y Los Privados y Privadas de Libertad de Origen Comun. Comunicado (Sept. 20, 2013), *archived at* http://perma.cc/4L9J-BN4L [hereinafter Voceros Nacionales].

209. *Id.*

210. Archibold, *supra* note 62.

211. Archibold, *supra* note 62.

212. Archibold, *supra* note 62.

213. Archibold, *supra* note 62.

214. *OAE Garante de Tregua entre Pandillas de El Salvador*, EL UNIVERSAL (July 12, 2012), http://www.eluniversal.com.mx/notas/858876.html, *archived at* http://perma.cc/QW3B-G3V7.

215. Sanz, *supra* note 59 (translated by the author).

216. Sanz, *supra* note 59.

217. *Pandillas Salvadoreñas Entregan Armas como Parte de una Tregua*, *supra* note 1.

218. Voceros Nacionales, *supra* note 207.

truce and its viability in other contexts. Government officials in Guatemala, where gang leaders are said to be considering a truce, initially dismissed the idea of participating[219] but have softened that position. In January 2013, Guatemalan President, Otto Perez, said his administration was looking for "another way to treat [the gangs]."[220] While the Guatemalan Barrio 18 has said it is ready to come to the table, Perez noted that the structure of gangs and criminal activity there would make it difficult to replicate the results in El Salvador.[221]

In May 2013, Honduran officials announced that Barrio 18 and the MS-13 had begun a peace process similar to that of their Salvadorian counterparts.[222] However, the Honduran version of a truce has yet to yield any decrease in the homicide rate.[223] In fact, murders in the twenty-eight days following the truce were up from the twenty-eight days preceding it.[224] Honduras's ability to reproduce the results of the truce in El Salvador may be impeded by the less centralized nature of the Honduran gangs and the more disparate causes of violence apart from gang activity.[225]

While Central American countries have expressed interest in the truce, American officials have kept their distance. Mari Carmen Aponte, the American ambassador to El Salvador, said, "[w]e think that, yes, it has reduced crime, but long-range, sustainably, we feel that we have to address the root causes in order to be effective and for any reduction to be sustainable."[226] Despite this cautionary approach, Aponte reiterated that the embassy supports after-school programs and community policing efforts.[227] In October 2012, the US Treasury Department designated the MS-13 as a "transnational criminal organization," a status that allows the government to seize its assets and prohibits banks from doing business with the *mara.*[228] Salvadorian President Mario Funes and others criticized the decision,

---

219. Archibold, *supra* note 62.

220. Hannah Stone & Miriam Wells, *Guatemalan President Seeks 'Alternative' Approach to Gangs*, INSIGHT CRIME (Jan. 24, 2013), http://www.insightcrime.org/news-briefs/guatemalan-president-open-negotiating-gangs, *archived at* http://perma.cc/B6Q7-6BTC.

221. *Id.*

222. James Bargent, *Honduran Gangs May Replicate El Salvador Truce*, INSIGHT CRIME (May 27, 2013), http://www.insightcrime.org/news-briefs/honduran-gangs-to-replicate-el-salvador-truce, *archived at* http://perma.cc/78MA-W5PN.

223. James Bargent, *Murders in Honduras Rising Despite Gang Truce*, INSIGHT CRIME (Aug. 5, 2013), http://www.insightcrime.org/news-briefs/murders-in-honduras-rising-despite-gang-truce, *archived at* http://perma.cc/S9WW-LPXY.

224. *Id.*

225. *Id.*

226. Archibold, *supra* note 62.

227. Archibold, *supra* note 62.

228. Jeff Tyler, *Obama Administration Targets Latino Street Gang MS-13*, MARKETPLACE.ORG (Oct. 11, 2012), http://www.marketplace.org/topics/world/obama-administration-targets-latino-street-gang-ms-13, *archived at* http://perma.cc/FHR4-PD7K.

saying that it overestimated the financial sophistication of the MS-13 by putting it on par with organizations such as the Zetas of Mexico and the Camorra of Italy.[229] There has been speculation that the classification was an attempt by the US government to controvert the positive image that the MS-13 has gained from the truce and to make it more difficult politically for the Funes administration to support the truce going forward.[230] Others speculated that this might be a sign of the Obama administration attempting to support the truce by putting more pressure on MS-13 and increasing the Salvadorian government's leverage in negotiations.[231] Sources inside the US Treasury and Homeland Security Departments denied any connection between the classification and the truce.[232] They instead insisted that the classification was based on new information of a strong cross-border relationship among the organization's members and that *clicas* in the United States seek dispute resolution from and send money to the gang's leaders in El Salvador.[233] Despite the sources' insistence that there was no connection between the truce and the classification of the MS-13 as a transnational criminal organization, the timing remains suspect.[234] While not indicating hostility to the truce, the government sources indicated that the US will retain the classification even if MS-13 becomes a legitimate organization in El Salvador as a result of negotiations there.[235]

In January 2013, the US State Department also updated its travel warning for El Salvador citing the high level of violence in the country.[236] While the warning acknowledges the reduction in violent crime due to the truce, it notes that the sustainability of such a decline is unclear.[237] The

229. Geoffrey Ramsey, *El Salvador President: U.S. 'Overestimating' MS-13*, INSIGHT CRIME (Oct. 14, 2012), http://www.insightcrime.org/news-briefs/el-salvador-president-us-overestimating-ms-13, *archived at* http://perma.cc/PK8Q-BNMZ.

230. *Id.*

231. Hannah Stone, *U.S. Ranks MS-13 Alongside Zetas in Gang List*, INSIGHT CRIME (Oct. 11, 2012), http://www.insightcrime.org/news-analysis/us-ms13-zetas-transnational.

232. Hannah Stone, *U.S. Defends Blacklisting of Salvador Street Gang*, INSIGHT CRIME (Nov. 29, 2012), http://www.insightcrime.org/news-analysis/us-defends-blacklisting-of-salvador-street-gang-ms13, *archived at* http://perma.cc/6HQP-2Q7B.

233. *Id.*

234. *Id.*

235. *Id.*

236. U.S. Dep't. of State, Bureau of Consular Affairs, *El Salvador Travel Warning*, U.S. EMBASSY SAN SALVADOR (Jan. 23, 2013), http://sansalvador.usembassy.gov/travel_warning_23jan23.html, *archived at* http://perma.cc/LY7Y-CV2M. The travel warning was updated on August 9, 2013, and removed any mention of the truce. U.S. Dep't. of State, Bureau of Consular Affairs, *El Salvador Travel Warning*, TRAVEL.STATE.GOV, http://travel.state.gov/content/passports/english/alertswarnings/el-salvador-travel-warning.html (last updated Aug. 9, 2013, *archived at* http://perma.cc/HJJ7-XLPZ).

237. U.S. Dep't. of State, Bureau of Consular Affairs, *El Salvador Travel Warning*, U.S. EMBASSY SAN SALVADOR (Jan. 23, 2013),

leaders of the *maras* as well as the El Salvadorian government responded skeptically, noting that such a warning could have easily been issued in 2010 or 2011 when the violence was at its worst, and calling into question the timing of the United States.[238]

Although the classification of MS-13 by the Treasury Department and the travel warning issued by the State Department are not attempts to directly undermine the truce, they could damage its viability. An important aspect of the re-integration of *mareros* into Salvadorian society involves jobs and economic development. According to a recent report by Americas Society and Council of the Americas, several multinational corporations, including Microsoft, are engaged in economic development in the region.[239] Some of these companies have specific jobs programs for ex-*mareros*.[240] If the truce is to succeed, additional programs will need to be initiated.[241] However, the report emphasizes that such efforts will only work if they are also financially beneficial to the corporations.[242] The signals that the United States has been sending regarding the gangs in El Salvador may make some corporations think twice before relocating jobs to the country, and especially before creating jobs programs for ex-gang members.

In early 2013, then-Security Minister David Munguia Payes and truce-broker Bishop Fabio Colindres went to Washington to request funding to support the efforts of the truce; they visited the offices of Rubén Hinojosa, Mike Honda, Mark Werner, Mathew Salmon, and Javier Becerra and were roundly rejected.[243] In June, the United States approved $91.2 million in funding for security programs in El Salvador; provisions for the truce, however, were conspicuously absent.[244] This lack of US support leaves questions about the economic feasibility of the truce going forward.

---

http://sansalvador.usembassy.gov/travel_warning_23jan23.html, *archived at* http://perma.cc/LY7Y-CV2M

238. *Pandilleros Salvadoreños Refutan Advertencia de EU por Violencia*, EL NUEVO DIARO (Jan. 28, 2013) http://www.elnuevodiario.com.ni/sucesos/275877-pandilleros-salvadorenos-refutan-advertencia-de-eu-violencia, *archived at* http://perma.cc/K2S-86FE (translated by the author).

239. Elyssa Pachico, *How Multinationals Can Help El Salvador's Ex-gang Members,* INSIGHT CRIME (Jan. 15, 2013), http://www.insightcrime.org/news-analysis/multinationals-help-salvador-ex-gang-members, *archived at* http://perma.cc/78EZ-CG6S.

240. *Id.*

241. *Id.*

242. *Id.*

243. Tomás Guevara, *Tregua de Pandillas Sin Apoyo de EEUU*, ELSALVADOR.COM (Apr. 11, 2013) http://www.elsalvador.com/mwedh/nota/nota_completa.asp?idCat=47859&idArt=7813871, *archived at* http://perma.cc/5VPX-NBN8.

244. Miriam Wells, *US Funds El Salvador Security, Not Gang Truce*, INSIGHT CRIME (June 17, 2013), http://www.insightcrime.org/news-briefs/us-funds-el-salvador-security-not-truce, *archived at* http://perma.cc/ET7U-ZWZZ.

E. Looking to the Past to Build Solutions Moving Forward: Esquipulas III

The year 2012 marked the twenty-fifth anniversary of the Esquipulas II Accord,[245] an agreement among Central American nations to work for peace in the region. Recently, former Guatemalan President Vinicio Cerezo suggested that a new Esquipulas Accord could help combat violence, corruption, and inequality in Central America.[246] The original Esquipulas moved away from military solutions and sought dialogue and negotiation, democratization and peace.[247] Such an agreement could address security concerns and alleviate economic inequality and corruption, which contribute to gang violence in the region. Such an agreement could also lay a foundation for further dialogue and economic development that would support the continuation of the peace process in El Salvador.

VI. THE ROLE AND EFFECTS OF INTERNATIONAL LAW ON THE TRUCE IN EL SALVADOR

While the effects of the violence perpetrated by *maras* are highly localized, as evidenced by the viability of the "peace zones," the problem of transnational gangs is an international problem. The *maras* are themselves international in nature spanning all of North America and even into Europe.[248] The response to *maras* has also often been regional, multi-lateral, or international.[249] Additionally, the level of violence and displacement caused by *maras,* especially in the Northern Triangle, has reached levels that rival the civil wars of the 1970s and 1980s.[250] What role does international law play in the viability of the peace process in El Salvador, or other efforts to reduce *marero* violence moving forward?

A. A Brief History of the Development of International Law and Its Relationship to Violence

The historical development of international law has to a large extent been precipitated by conflict and war. The origin of the modern framework

245. Acuerdo de Esquipulas II, Aug. 7, 1987, 26 I.L.M. 1166 (1987) *archived at* http://perma.cc/5K5Y-NJLE.

246. Cynthia J. Arnson, *Would Another Peace Accord Help Central America?*, WILSON CENTER (Aug. 28, 2012), http://www.wilsoncenter.org/article/latin-american-program-the-news-would-another-peace-accord-help-central-america, *archived at* http://perma.cc/3PVV-4S44.

247. *Id.*

248. *See supra* Part II.B.

249. *See supra* Part IV.A.

250. *See* McKleskey, *supra* note 5; GLOBAL BURDEN OF ARMED VIOLENCE 2011: LETHAL ENCOUNTERS, *supra* note 6.

is usually traced to the sixteenth century and the Peace of Westphalia (1648), which concluded the Thirty Years War.[251] The next era in international law was marked by the Paris Peace Conference and the treaties ending World War I, which demarcated an unsuccessful attempt to regulate the use of force through international law.[252] The subsequent phase of international law was precipitated by both World War II and the UN Charter of 1945 and was characterized by prohibition on the use of force.[253] This era ended with the fall of the Soviet Union in 1989.[254]

Since 1989 there have been two phases, one lasting from the fall of the USSR until 2001, and the other commencing with the attacks of September 11.[255] The collapse of the Soviet Union and the subsequent transition to a multipolar world "reinforced the trend toward an expanded role for international institutions in the management and peaceful resolution of conflicts."[256] During this period, there were an abundance of peace agreements, often brokered with UN involvement, which aimed to end internal wars.[257] The period also saw substantial developments in some of the most high-profile conflicts of the time such as the Israeli-Palestinian dispute, the South African Civil war, and the troubles in Northern Ireland.[258]

A major, overarching phase in contemporary international law was precipitated by the attack on the World Trade Centers on September 11, 2001, and is characterized by a "subjugation of international law to international politics and US hegemony."[259] The World Trade Center attacks have affected the international security system, anti-terrorism policy, and conflict-management approaches.[260] As in Central America with the *maras*, a traditional approach to counter-terrorism focuses on coercive governmental action and avoidance of dialogue or negotiation with terrorist groups.[261] These approaches are supported by claims that negotiations

---

251. ANTONIO CASSESE, INTERNATIONAL LAW 22 (2d ed. 2005).

252. CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS & THE LEX PACIFICATORIA 78 (2008).

253. *Id.*

254. *Id.* at 78-79.

255. *Id.* at 79.

256. L. Sergio Germani & D.R. Kaarthikeyan, *Introduction* to PATHWAYS OUT OF TERRORISM AND INSURGENCY: THE DYNAMICS OF TERRORIST VIOLENCE AND PEACE PROCESSES ix (L. Sergio Germani & D.R. Kaarthikeyan eds., 2005).

257. For example, agreements were reached in Namibia (1988), Western Sahara (1988), Lebanon (1989), Angola (1991 and 1994), South Africa (1991), Cambodia (1991), Mozambique (1992), El Salvador (1992), Ethiopia/Eritrea (1993), Rwanda (1993), Somalia (1993), Afghanistan (1993), Guatemala (1995), Nicaragua (1995), and Liberia (1995). *Id.* at ix-x.

258. *Id.*at x.

259. BELL, *supra* note 252, at 79.

260. Germani & Kaarthikeyan, *supra* note 256, at xviii.

261. Germani & Kaarthikeyan, *supra* note 256, at xiv.

between a government and a terrorist group legitimates the terrorists and weakens the moral authority of the State.[262] Opponents of dialogue also argue that a "peace process" is only a change in tactics on the part of a terrorist organization, rather than a legitimate expression of surrendering the threat of violence, which gives them power.[263]

B. The Development of International Humanitarian Law which Governs Internal Armed Conflict

International Humanitarian Law (IHL), or "the law of war," was developed to protect people from the consequences of unchecked violence.[264] However, while this is the goal of IHL, "realistically one can simply require international law to *mitigate* at least some of the most frightful manifestations of the clash of arms. This is precisely what the rules of warfare endeavor to do."[265] Traditional law governing such conflict "was either restated and codified, or developed, at the Brussels Conference of 1874 and at The Hague Peace Conferences of 1899 and 1907."[266] The rules embodied in these conventions applied only to inter-State armed conflicts, and fighting by insurgents remained under the rule of domestic criminal law (unless the State granted the insurgents belligerency).[267] There were a few specific prohibitions of weapons under the rules, and some general principles put into place; for example, belligerents could determine how to enforce compliance with IHL, either via belligerent reprisals or prosecution and punishment under the laws of war.[268]

During World War II, many new classes of combatants emerged, such as resistance movements in the German occupied territories. However, these combatants were not recognized as "lawful combatants" under the Hague codification.[269] Additionally, as guerrilla warfare spread throughout the colonial world, countries felt that guerrillas, who did not fit within the traditional definition of "combatants," "should be upgraded to the status of lawful combatants subject to conditions."[270] The increase in "wars of the poor," or struggles for national liberation waged by liberation movements and carried out by guerrillas, civil wars (often in less-powerful countries, but backed on either side by world super-powers), and terrorism rendered

---

262. Germani & Kaarthikeyan, *supra* note 256, at xiv.

263. Germani & Kaarthikeyan, *supra* note 256, at xv.

264. *See* Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT'L L.J. 297 (2009).

265. CASSESE, *supra* note 251, at 399 (emphasis in original).

266. CASSESE, *supra* note 251, at 400.

267. CASSESE, *supra* note 251, at 401.

268. CASSESE, *supra* note 251, at 401.

269. CASSESE, *supra* note 251, at 402.

270. CASSESE, *supra* note 251, at 402.

the Hague codification defective and inadequate to address the realities of emerging warfare.[271]

These developments led States to first adopt the Geneva Conventions of 1949 and then later two Protocols in 1977.[272] While these Conventions and Protocols take into consideration the growing involvement in armed conflict of both civilians and civilian installations, they maintain the basic distinction between combatants and persons who do not take part in hostilities.[273] Also, after the attacks of September 11, 2001, there was a shift by the United States from addressing "terrorism" under domestic law to utilizing IHL—for example, with how the US defined terrorism for the war waged by the US-led coalition in Afghanistan.[274] Throughout history, IHL has shifted to encompass new and emerging types of armed conflict; however the contours of *marero* violence has not as of yet been specifically addressed by IHL.

C. The Current Legal Regulation of Internal Armed Conflict (IAC)

Although *marero* violence is transnational in nature, much of the actual combat is limited to single nations. The law governing internal armed conflict is shaped largely by the inherent conflict between "lawful" governments (whose interest is in regarding rebels as criminals without international status) and the non-State rebels (who want to be internationally recognized).[275] International law generally used to be conceived of as only applying to State actors and only being made by sSate actors.[276] However, a more modern approach is that international law regulates the rights and obligations of non-State actors, such as individuals, international bodies, NGOs, and armed groups.[277] In line with this, "[a]ll rules governing the struggle between the lawful government and insurgents have one main feature in common: they do not grant rebels the status of lawful belligerents. In the eyes of both the government against which they fight and of third-party States, rebels remain criminals infringing domestic penal law."[278] Insurgents only become lawful combatants if the government

---

271. CASSESE, *supra* note 251, at 402-03.

272. CASSESE, *supra* note 251, at 404.

273. CASSESE, *supra* note 251, at 404.

274. *International Humanitarian Law and Terrorism: Questions and Answers*, INT'L COMMITTEE OF THE RED CROSS (Jan. 1 2011), http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm, *archived at* http://perma.cc/8TB2-WEAB.

275. CASSESE, *supra* note 251, at 429.

276. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 108 (2012).

277. *Id.*

278. CASSESE, *supra* note 251, at 429.

decides to grant them the recognition of belligerency.[279] Also, rules of IAC typically are focused on the protection of non-combatants only.[280] Typically, "States prefer to leave fighting substantially unrestricted on the clear assumption that, being militarily stronger than insurgents, they may quell rebellion more easily by remaining untrammeled by law."[281] Thus far in El Salvador, this has been the policy toward *marero* violence and conflict. The Salvadorian government has attempted to address the issue with domestic criminal law reforms (such as *Super-Mano Dura*) and increased police and military enforcement of such laws.

D. The Limitations of IHL

Practically speaking, it is unclear whether IHL as currently applied has a role to play in the regulation of the gang warfare that plagues Central America. The continuity and intensity of the violence in El Salvador and surrounding countries rises to the level of many recognized inter-State conflicts and to the level of the intra-State conflicts that plagued the region in the 1970s and 1980s; the gangs may have reached sufficient levels of sophistication and control of territory in order to meet the definitional standards laid out under some of the IHL standards, but application can be politically difficult.[282]

A major limitation to the application of IHL is that the ultimate determinative question of whether a conflict rises to the level necessary to be governed by IHL must be determined by an international body such as the ICJ, UN Security Council, or the UN Commission on Human Rights.[283] Due to the nature of international bodies, it is quite possible that a given conflict may never arrive in front of one of these decision makers, or that it may take a long time. However, until an international body determines the application of one of these definitions, the State has the power to determine the nature of the conflict.[284] Finally,

> [o]ver the years mankind has witnessed steady progress in the sophistication, the devastating effects, and the cruelty of weapons and methods of combat. International *legal control* of warfare has kept pace with developments in organized armed violence only to a limited extent. States and, in particular, major military Powers have not accepted sweeping restraints, with the consequence that this body of

279. CASSESE, *supra* note 251, at 429.
280. CASSESE, *supra* note 251, at 430.
281. CASSESE, *supra* note 251, at 430.
282. *See* Steinhoff, *supra* note 264, at 312.
283. Steinhoff, *supra* note 264, at 313.
284. Steinhoff, *supra* note 264, at 313.

law is beset with deficiencies, loopholes, and ambiguity.[285]

It is in large part because of these ambiguities and loopholes, along with States' resistance to the application of international law and preference for domestic law, that application of IHL in its current form to the *marero* violence is unlikely.

E. International Human Rights Law's Role in the Conflict

El Salvador is bound by several International Human Rights treaties, including the International Convention on Civil and Political Rights (ICCPR).[286] The ICCPR obligates State Parties to undertake to ensure the rights contained in the covenant.[287] Under article 2,

> the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.[288]

Several of the articles of the ICCPR might be implicated by the violent situation in El Salvador. Article 6, for example, states in relevant part that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[289] This provision, combined with article 2, obliges El Salvador to prohibit the action of private citizens, such as *mareros*, from arbitrarily depriving anyone of life. Prior to the gang-truce, El Salvador aimed to meet its obligation through traditional suppression methods mixed with some rehabilitative measures. However, it could be argued that now that the truce has had substantial success in reducing arbitrary deprivation of life, El Salvador could not withdraw from the peace process without breaching its obligations under the ICCPR. However, practically speaking this is unlikely. As is the case with IHL, the enforcement of non-criminal-IHRL is

---

285. CASSESE, *supra* note 251, at 434.

286. *Status of the International Convention on Civil and Political Rights*, UN TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Nov. 13, 2013, *archived at* http://perma.cc/7B5Z-L62N) (El Salvador ratified the ICCPR on Nov. 30, 1979, without reservation).

287. International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

288. Human Rights Committee, General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (May 26, 2004, *archived at* http://perma.cc/WYP9-JCXN).

289. ICCPR, *supra* note 287, art. 6.

largely executed by States, and it is unlikely that these States will go so far as to hold El Salvador in violation of its obligations under the ICCPR because of El Salvador's choice of crime reduction strategy for fear of future infringements on each State's own sovereignty in the area of domestic criminal law. The other problem with IHRL with respect to the *marero* conflict in El Salvador is that only State Parties are bound by IHRL agreements, which neither bind the actions of the *mareros* nor create alternate strategies for reducing violence.

F. How IHL & IHRL Inform the Truce in El Salvador

Although IHL and IHRL are unlikely to provide any immediate protection from violence or relief for the people of El Salvador, they are still likely to perform an important function in the peace process. The laws that make up the law of armed conflict and human rights law perform an important normative and moral function: "[T]hey serve as a moral and political yardstick by which public opinion and non-governmental groups and associations can appraise if, and to what extent, States misbehave."[290] Therefore IHL and IHRL have an important normative role to play in the peace process in El Salvador. The overall message of IHL is clear: "Regardless of the point of view, humanitarianism should be the focus . . . . To maximize humanitarian goals, legitimacy should not be a concern when engaging a group."[291] Arguably, norms accepted as part of IHL and IHRL are a group of norms which can form a basis for negotiation regarding particular forms of violence and recruiting as the peace process moves forward.

G. A Developing Body of Law Beyond Current International Law

International law has shifted and changed over time to keep pace with the changing nature of armed conflict. As an increasing amount of sustained armed conflict is related to criminal organizations, it is possible that States will become more open to the idea of creating humanitarian frameworks governing such conflicts. This includes an emerging "Law of Peace."

Even if a conflict is not subject to IHL, the parties are able to apply all or part of the Conventions to the conflict by agreement.[292] The Geneva Convention's safeguards for civilians in all conflicts can be rendered useless through the non-compliance of armed groups, putting civilians at highest risk.[293] Also, "[s]ince the main victims of twenty-first century conflicts are civilians, it should not be a matter of whether the actor

290. CASSESE, *supra* note 251, at 434.
291. Steinhoff, *supra* note 264, at 320.
292. Steinhoff, *supra* note 264, at 300.
293. Steinhoff, *supra* note 264, at 303.

agreeing to adhere to IHL norms is a state or armed group."[294] The former UN Secretary-General Kofi Annan repeatedly encouraged negotiations with armed groups to protect civilians and provide access to them during armed conflicts, stating:

> Whereas Governments are sometimes concerned that . . . engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide Governments in exercising their sovereign responsibility.[295]

Therefore, in spite of the lack of application of IHL, a State may choose to nevertheless engage an armed group in direct peace negotiations in order to advance humanitarian aims, like El Salvador chose to do in the case of the *maras*.

International Humanitarian Law, International Human Rights Law, and domestic criminal law tend to all work to regulate and restrict violence.[296] However, there is no developed body of law that outlines the establishing of peace out of violent conflict.[297] Christine Bell, in her book *On the Law of Peace*, argues "the practice of negotiating peace agreements is producing a new law of the peace maker—or *lex pacificatoria.*"[298] Bell examines contemporary peace agreements and distills theories about the form and function of contemporary peace agreements. She argues for an emerging enforceable law of peace that would apply to peace processes regardless of the application of IHL.[299]

Of particular relevance to the peace process in El Salvador, Bell restates the norms established by contemporary peace agreements regarding transitional justice.[300] This statement of the new law of transitional justice is as follows:

> (1) Blanket amnesties that cover serious international crimes are not permitted.

---

294. Steinhoff, *supra* note 264, at 303.

295. The Secretary-General, Reports of the Secretary-General on the Protection of Civilians in Armed Conflict, delivered to the Security Council, para. 20, U.N. Doc. S/2001/331 (Mar. 30, 2001), *quoted in id.* at 303-04.

296. BELL, *supra* note 252, at 5.

297. BELL, *supra* note 252, at 5.

298. BELL, *supra* note 252, at 5.

299. BELL, *supra* note 252, at 5.

300. BELL, *supra* note 252, at 40.

> (2) Some amnesty is required to facilitate the release, demilitarization and demobilization of conflict-related prisoners and detainees.
> (3) The normative commitment to accountability should be married with the goal of sustaining the ceasefire and developing the constitutional commitments at the heart of the peace agreement. This can be achieved by creative design based around the following mechanisms:
> (a) quasi-legal mechanisms which deliver forms of accountability other than criminal law processes with prosecution, such as Truth Commissions;
> (b) a bifurcated approach whereby international criminal processes for the most serious offenders coupled with creatively designed local mechanisms, including forms of amnesty for those further down the chain of responsibility, aim at a range of goals such as accountability, demobilization and reconciliation.
> (4) Should any party evidence lack of commitment to the peace agreement, and in particular return to violence, any compromise on criminal justice is voidable and reversible through the use of international criminal justice.[301]

This type of criminal amnesty seems unlikely in the current climate in El Salvador, especially given President Funes's recent rejection of the *mareros* proposal to repeal the new anti-mara law in exchange for disarmament in ten cities across El Salvador.[302] However, there are two things to consider. First, Funes is amenable to amending the anti-mara laws.[303] Second, it is important to recall that the *mareros* are not seeking to become a legitimate political party. As former congressman Raul Mijango said to ElFaro.com:

> What is victory for them? And when I began to reflect on this with them, it turns out that their war is about subsistence, about survival. . . . [T]hey are clear in telling you, and they have highlighted this for me several times: Don't confuse things, we are not guerrilla, we are a gang. And what do they mean by this? That they don't aspire to political power. . . . They are simply a social group that feels that society has denied them every opportunity to develop themselves and they have had to come together to

301. BELL, *supra* note 252, at 240.
302. *See supra* notes 166-67 and accompanying text.
303. *See supra* note 168 and accompanying text.

> survive. The big goal is to survive! Which means, this is a war with no end. And if there is no end, what is the cost to the country? The final reflection is: Why does this war exist? This will only have a solution if we look at the root causes.[304]

In spite of Funes's offer to amend current law, and the *mareros*' distinct goals, the participants in the peace process will likely encounter significant challenges negotiating any changes in the criminal laws regarding the *maras* because of the stringent opposition domestically and internationally to negotiating with criminals, and the inherent distrust of the *mareros*. However, while the *maras* currently are not collectively seeking release from jail, or amnesty for their previous crimes, they are seeking legal reforms that would make their survival individually and as an institution more sustainable without criminal activity. It will be interesting to see how these interests play out in the transitional phase of the peace process in El Salvador.

H. El Salvador's Conflicting Obligations under International Law

One reason that the Funes Government may be resistant to altering the anti-mara laws in El Salvador is due to a conflict in the country's obligations under international treaties and the current peace negotiations. According to article 144 of El Salvador's constitution, international treaties are incorporated into El Salvador's domestic law, and in case of conflict between domestic law and a treaty, the latter prevails.[305] This creates some competing obligations that apply to the current negotiations with the gangs in El Salvador.

I. UNODC Convention against Transnational Criminal Organizations

El Salvador is party to the United Nations Convention against Transnational Organized Crime.[306] This Convention addresses what State

---

304. Mónica Navoa, *El Salvador's Historic Truce May Show Pathway to Peace in the US*, COLORLINES (June 25, 2012, 9:58 AM), http://colorlines.com/archives/2012/06/gang_truce_el_salvador.html, *archived at* http://perma.cc/7N8L-SJ6G.

305. CONSTITUTION DE LA REPUBLICA DE EL SALVADOR, Articulo 144, *archived at* http://perma.cc/FRG8-94ZL.

306. Fifth Session of the Conference of the Parties, Vienna, Austria, Oct. 18-22, 2010, Status of Ratification of the United Nations Convention against Transnational Organized Crime and the Protocols
thereto and Notifications, Declarations and Reservations thereto as of 29 September 2010, U.N. Doc. CTOC/COP/2010/CRP.4, *archived at* http://perma.cc/FDW8-BT9D (El Salvador

Parties shall do to address transnational organized criminal organizations, including defining certain crimes to be incorporated into domestic criminal codes, and providing measures concerning international cooperation, money laundering prevention, and jurisdictional issues.[307]

The activities of the *mareros* in El Salvador almost certainly come under the definitions and scope of the Convention, at least by the text of the Convention alone. Article 2 defines an "organized criminal group" as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit."[308] The *maras* have large memberships, and have existed for decades. They act in concert to commit "serious crimes" (defined by article 2 as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty")[309] in order to obtain material benefits. They also meet the relatively loose definition of a "structured group," which does not require sophisticated levels of organization, but rather need only be "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure."[310]

To be governed by the Convention, an offense must be "transnational in nature," which means that:

> (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) *It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;* or (d) It is committed in one State but has substantial effects in another State.[311]

Maras like MS-13 and Barrio 18 will always fit this definition because of their strong presence in other North American countries.

Under article 5 of the Convention, State Parties are obligated to enact laws criminalizing participation in organized criminal groups.[312] Article 5, in relevant part, reads:

---

ratified the Convention on March 18, 2004).

307. *See generally* United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209, *archived at* http://perma.cc/YS38-M6PR.

308. *Id.* art. 2.

309. *Id.*

310. *Id.*

311. *Id.* art. 3 (emphasis added).

312. *Id.* art. 5.

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
> a. Criminal activities of the organized criminal group;
> b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim . . . .[313]

This article of the Convention functions to criminalize membership in the *maras* because it is widely known that the *maras* have a criminal "aim" (yet, perhaps, not a criminal "end") and it would be difficult to deny that one had knowledge of the "aim" of the *maras*. The Convention does not require that the individual participate in the criminal activities in order to be subject to criminal penalty, but rather that one "actively participate in other activities of the organized criminal group" with knowledge that it will advance the organization's criminal aim. The scheme laid out under the Convention essentially criminalizes joining a *mara* and actively participating in a wide range of non-criminal activities, as long as one knows that the participation will advance the group's criminal acts. This becomes important as repeal of the criminalization of gang membership has become a lynchpin of the negotiations.

Adding complication, some have argued that those acting in support of the truce are in violation of the domestic law, which criminalizes gang membership.[314] Enacted in September 2010, the law which outlaws *maras,*

---

313. *Id.*

314. Hannah Stone, *Why El Salvador's Gang Truce is Illegal, and Why it Matters*, INSIGHT CRIME (Mar. 27, 2013), http://www.insightcrime.org/news-analysis/el-salvador-gang-truce-illegal, *archived at* http://perma.cc/L2EU-6GJF; Jose Luis Sanz, *La Tregua entre Pandillas o el Estado en Conflicto con la Ley*, EL FARO (Mar. 4, 2013), http://www.elfaro.net/es/201303/noticias/11225/, *archived at* http://perma.cc/S8JW-AGRU.

pandillas, groups, associations, and organizations of a criminal nature makes individuals who participate in otherwise legal acts criminally liable if the acts provide support to the gang.[315] Some in the government have acknowledged that this law is an impediment to negotiations because the government actors risked criminal liability if they provided jobs, financing, or neighborhood improvements as part of negotiations.[316] Former Vice Minister Moreno said of the law that "[y]es, it is an obstacle[.] When it was passed it didn't establish an exception for rehabilitation. We need to further develop this discussion."[317]

As the peace process continues, it seems that the gangs will continue to demand repeal of laws criminalizing gang membership and support. If El Salvador repealed such laws, it would likely be in breach of its obligations under the Convention against Transnational Organized Crime. If the peace process is to move forward, these conflicts between El Salvador's obligations under international treaties and its domestic laws which aim at decreasing transnational crime and the demands of the process of negotiation with the *maras* must be resolved. These conflicts will shape the direction of the peace process and may contribute to its ultimate success or failure.

VII. CONCLUSIONS—HOW CAN THE INTERNATIONAL COMMUNITY AND INTERNATIONAL LAW SHIFT TO SUPPORT THE PEACE PROCESS IN EL SALVADOR?

The violent *marero* conflicts in El Salvador and other countries, especially in the Northern Triangle, have reached an intensity rivaling the civil wars in that region. These conflicts have elicited a variety of responses domestically (in the form of *mano dura* and *mano amiga* policies), internationally, regionally, and multilaterally in the form of military and police support, funding, and strategy agreements. In March 2012, the Government of El Salvador, the OAS, and civil society actors within El Salvador sought to engage the *maras* in negotiations to end the violence in the country. In spite of some setbacks, the truce has been honored for over a year, and the peace process has developed into a second phase, establishing "peace zones," which will be free of all criminal activity. These negotiations have led to notable decreases in the homicide rate in El Salvador. Now, Honduras has enacted a similar truce and Guatemala is examining the possibility of "alternative approaches" to dealing with gang violence. However, the United States and many inside El Salvador have

315. La Ley de Proscripción de Maras, Pandillas, Agrupaciones, Asociaciones y Organizaciones de Naturaleza Criminal, Dicrito 458, art. 2, Diario Oficial 169, Tomo 388, Sept. 10, 2010 (El Salv.), *archived at* http://perma.cc/FRF8-RL7T.

316. Sanz, *supra* note 314.

317. Sanz, *supra* note 314 (translated by the author).

been skeptical of the truce. Although the United States has not directly sought to undermine the truce, the classification of MS-13 by the US Treasury Department and the US State Department's January 2013 travel warning both were seen by the *maras* and by the Salvadorian government as backhanded criticism of the truce. Within El Salvador there are claims that violence has not decreased, but is being hidden by the *maras*, and that the *maras* are not actually seeking peace, but are using the truce as a platform to legitimize themselves, reduce police scrutiny, and reorganize and become stronger.

The peace process in El Salvador has the potential to serve the same humanitarian goals that have been the impetus for the development of international law since the development of the international community. These humanitarian goals, embodied in the norms of IHL and IHRL, can be achieved through direct negotiations with armed groups like the *maras.* However, concerns among States in the international community have disincentivized direct negotiation with armed groups for fear of legitimizing them or giving them international personality. While legitimizing armed groups is a concern, the political and legal effects of such legitimacy are dwarfed by the immense humanitarian benefits of successful negotiation, especially in the case of El Salvador where the results have been so drastic.

In spite of these disincentives, the Funes administration and the Secretary General of the OAS have been willing to engage with armed *maras* because they recognize the important benefits for the people of El Salvador in reducing violence, crime, and extortion. However, there are international legal and political pressures and mounting domestic pressures that restrict the flexibility of the government in these negotiations. The UNODC Convention Against Transnational Crime Organizations and its companion laws in El Salvador are proving to be substantial impediments to peace in El Salvador. It is important that the international community begin to develop a framework that serves the longstanding goals of international law while honoring sovereignty and the rule of law which will support engagement with armed groups like the *maras* of El Salvador.

Because of the transnational nature of the *maras*, it is crucial that other countries in the region, even if they choose not to negotiate with *mareros* domestically, do not act to undermine the peace process in El Salvador. Although the United States has not directly acted to undermine the truce, officials have said that the government will continue to sanction MS-13 even if they become a legitimate political organization in El Salvador. This would most certainly undermine the sustainability of peace processes in El Salvador and beyond, which will depend to some extent on the availability of jobs and economic development in the region. This development will be difficult to come by if the largest economic player in the region continues to send signals of its skepticism regarding the viability of peace. To this end, it may be beneficial to seek a regional agreement on a framework that countries in the region are dedicated to the goal of peace

similar to Esquipulas I and II—the agreements which presented a framework for an end to the wars in Central American in the 1990s. In Esquipulas II, the countries of Central America agreed to "the cessation of hostilities" and promised "to take all necessary action to achieve an effective cessation to the fire within a constitutional framework."[318] While such agreements do not end internal conflicts, they do provide a basis on which the States involved in the conflicts agree to seek peace rather than impede it, an important step along the road to a sustainable and lasting peace. Without such cooperation and support the peace process in El Salvador cannot survive.

318. Acuerdo de Esquipulas II, *supra* note 245.

PIRACY IN SOMALIA: A LEGAL ANALYSIS CONCERNING THE PROSECUTION OF PIRATE NEGOTIATORS AND PIRATE FACILITATORS UNDER THE CURRENT US AND INTERNATIONAL FRAMEWORK

Graham T. Youngs*

I. INTRODUCTION

"A pirate, under the laws of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. . . . But piracy, under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation can increase or diminish the list of offenses thus punishable."[1]

- Chief Justice John Marshall

A. Piracy by the Numbers: An Introduction to The Current Piracy Problem

Piracy off the coast of Somalia remains an issue with implications for the international community generally and for the Somali government specifically. Regardless of its genesis, piracy off the coast of Somalia "has in essence become an organized, lucrative and attractive criminal activity undertaken for heinous ends."[2] Although the number of people being held hostage by pirates is in constant flux,[3] the piracy problem implicates several enduring issues: the protection of human lives, the maintenance of channels for international commerce, and continuing respect for Somali territorial waters.

---

* Graham Youngs received his J.D. in 2014 from the Indiana University Robert H. McKinney School of Law. He would like to thank Professor Yvonne Dutton for her input and guidance. The author would also like to express his sincere gratitude to the student note candidates, editorial board, and executive board members of the *Indiana International and Comparative Law Review* (II&CLR) for their invaluable help during the editing process.

1. United States v. Ali, 885 F. Supp. 2d 17, 27 (D.D.C. July 13, 2012), *opinion vacated in part*, 885 F. Supp. 2d 55 (D.D.C. July 25, 2012) (citing Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 230 (1990)).

2. Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, ¶¶ 13, 43, U.N. Doc. S/2011/30 (Jan. 24, 2011) (by Jack Lang) [hereinafter Lang Report].

3. *See International Maritime Bureau*, *Piracy & Armed Robbery News & Figures,* INT'L CHAMBER OF COMMERCE (Oct. 27, 2012), http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures, *archived at* http://perma.cc/5AUR-KZ7M (The IMB is an apolitical organization charged with "receiving and disseminating reports of piracy and armed robbery 24 hours a day, across the globe.").

The problem of piracy has far-reaching economic implications: an estimated 40 percent of the world's trade is shipped through part of the Indian Ocean, around the Horn of Africa, and into the Red Sea—a route that is rife with Somali pirate attacks.[4] A report issued by the One Earth Future Foundation (OEF) estimated Somali piracy cost between $6.6 and $6.9 billion in 2011.[5] The shipping industry bore 80 percent—or between $5.3 and $5.5 billion—of that total cost in 2011.[6] The overall cost of piracy does not appear to be waning in the near future. Due to the rebound in global maritime trade volume, the geographic expansion of piracy, and increasingly sophisticated piracy efforts, some sources suggest that, "[c]onsidering Somali piracy as an increased cost of trade translates into an estimated US$18 billion yearly loss to the world economy."[7]

Other sources rely on more optimistic piracy figures from 2012 to suggest that significant progress has been made.[8] For instance, some figures from the US Navy suggest a 75 percent decline in the number of pirate attacks during 2012 as compared with 2011.[9] The decline in the number of pirate attacks comes in the wake of a multi-pronged effort from the United States, the UK, NATO, the EU, and the international community—as well as the private sector in general.[10] The prongs of the effort focus on several categories including diplomatic engagement, military power, collaboration with the private sector, legal enforcement, targeting pirate networks, and the development of the Somali government.[11] The scope of this Note, however,

---

4. Remarks of Richard Ottaway, EUR. PARL. DEB. at 144WH (June 14, 2012), *archived at* http://perma.cc/7FHW-D556.

5. ANNA BOWDEN & SHIKHA BASNET, THE ECONOMIC COST OF SOMALI PIRACY 2011 1 (One Earth Found. 2011), *archived at* http://perma.cc/7FHW-D556 [hereinafter BOWDEN & BASNET REPORT] (Total cost was calculated across both government and industry categories, including: labor, prosecutions, organizations, military, ransoms, insurance, security equipment, re-routing, and increased speed.).

6. *Id.*

7. THE WORLD BANK REG'L VICE-PRESIDENCY FOR AFR., THE PIRATES OF SOMALIA: ENDING THE THREAT, REBUILDING A NATION xxiii (2013), *archived at* http://perma.cc/78K-8WY2 [hereinafter PIRATES OF SOMALIA: ENDING THE THREAT].

8. *See* Thomas Kelly, Principal Deputy Assistant Sec'y, U.S. Bureau of Political-Military Affairs, Remarks at Combating Piracy Week in London, United Kingdom (Oct. 25, 2012), *archived at* http://perma.cc/GL2S-M635 [hereinafter Thomas Kelly Remarks]; *see also* Ronald K. Noble, INTERPOL Sec'y General, Welcome Address at the Conference on Maritime Piracy Financial Investigations, (Jan. 19-20, 2010), *archived at* http://perma.cc/F9J3-GKU8 (noting a decrease in the number of pirate attacks in the Indian Ocean during the first quarter of 2012 as compared with the first quarter in 2011).

9. Thomas Kelly Remarks, *supra* note 8. "In January 2011, pirates held 31 ships and 710 hostages. Today, pirates hold five ships and 143 hostages. That is roughly a 75 percent reduction in ships and hostages held by pirates since January 2011." Thomas Kelly Remarks, *supra* note 8; *see also Key Figures and Information*, EUNAVFOR (Nov. 5, 2012), http://eunavfor.eu/key-facts-and-figures/, *archived at* http://perma.cc/QT3R-4YDS.

10. Thomas Kelly Remarks, *supra* note 8.

11. Thomas Kelly Remarks, *supra* note 8.

will focus on the legal enforcement issues related to the targeting of pirate networks and the prosecution of pirate negotiators and higher-ranking pirates whose crimes are typically categorized as "white-collar." These white-collar pirates are responsible for providing funding, organizational tools, and political capital.[12]

Legal enforcement, or the use of effective legal prosecution and incarceration to deter piracy, appears to be working to some degree: in 2011, for example, there were more than 1,000 pirates in custody in twenty countries around the world.[13] However, not all experts find these numbers convincing—some experts note that as many as nine out of ten pirates captured by States patrolling international waters will be released without being prosecuted.[14] In a 2011 report on legal issues related to piracy off the coast of Somalia, Special Adviser Jack Lang noted that there has been increased development and sophistication within piracy networks.[15] In particular, the ability of pirate networks to marshal logistical support for the negotiation of ransoms and the holding of hostages has enabled a larger number of captures and thereby provided networks with a consistent source of revenue.[16] Irrespective of the number of ships captured, or the economic ramifications of piracy, one conclusion seems clear: "[p]iracy has gone from a fairly ad hoc disorganized criminal endeavor to a highly developed transnational criminal enterprise."[17]

B. The Role of Pirate Negotiators and Pirate Facilitators in the Scourge of Piracy

In some respects, the act of piracy itself has remained unchanged over time: "whether using swords or rocket propelled grenades, a galleon or a fastboat, a sextant or GPS, pirates will always be looking for easy targets and easy profit."[18] In the seventeenth and eighteenth centuries pirates may have plundered a ship's cargo for an easy profit; today however, human crews are equally valuable because of the availability and willingness of ship owners to pay ransoms.[19] As a result, pirate networks have made increasing use of pirate negotiators, or '"interpreters,"' to ensure successful

---

12. *See* PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 6.

13. Thomas Kelly Remarks, *supra* note 8.

14. Lang Report, *supra* note 2, at 21; *see also* Remarks of Richard Ottaway, *supra* note 4.

15. Lang Report, *supra* note 2, at 13.

16. Lang Report, *supra* note 2, at 13.

17. *Confronting Global Piracy Hearing Before the Subcomm. on Terrorism, Nonproliferation and Trade of the H. Foreign Affairs Comm.* 1 (2011) (statement of Andrew J. Shapiro, Assistant Sec'y, Bureau of Political-Military Affairs), *archived at* http://perma.cc/G38X-5BQG.

18. Noble, *supra* note 8.

19. Noble, *supra* note 8.

ransom transactions.[20] Using cell phones and satellite phones, pirate negotiators serve as the liaisons between the owners of hijacked ships and pirate bosses.[21] Often pirate negotiators serve as the interpreter for several ships, and in some cases may even provide negotiation services to multiple pirate networks simultaneously.[22] Negotiators must possess the foreign language skills—especially in the English language—to communicate with the ship's owners; moreover, they must possess the intangible social skills necessary to reconcile the interests of all the parties involved to procure a ransom.[23]

The ransom agreements have become increasingly costly for the owners of captured victim ships—based on available data, the OEF calculated statistics for 2011 and concluded that thirty-one ransoms were paid for a total of $159.62 million with an average ransom payment of $4.97 million.[24] Pirate negotiators are well compensated for their services—in fact, a negotiator typically receives twice the share of a regular pirate guard.[25] In addition to the salary a negotiator receives from his or her boss, some negotiators are able to procure additional, secret funds by having the shipping company wire them money directly into a foreign account.[26] For example, one particularly notorious pirate negotiator, Looyaan Si'id Barte, reportedly served as a negotiator in twenty pirate attacks between January 2009 and April 2011.[27] Based on a report from the Monitoring Group on Somalia and Eritrea, Looyaan received an estimated $500,000 for his negotiation services during that period of time.[28]

Other high-ranking, white-collar pirates also play a pivotal role in the piracy model. As a practical matter, the Somali hijack-for-ransom business model only exists insofar as pirate networks have consistent shore locations to anchor the captive ships during ransom negotiations.[29] Access to space on the Somali coast is necessary to protect captive ships from national and international law enforcement as well as rival piracy groups.[30] In exchange for anchorage locations, Somali pirates typically must pay an anchorage fee to local insurgent groups, or bribe the local government.[31] Thus, local

---

20. Monitoring Group on Somalia and Eritrea, Report pursuant to S.C. Res. 1916, U.N. Doc. S/2011/433 (Jul. 18, 2011) [hereinafter Report on Somalia and Eritrea].

21. *Id.*

22. *Id*. at 221.

23. *Id.* at 36.

24. BOWDEN & BASNET REPORT, *supra* note 5*; c.f.* Noble, *supra* note 8 (indicating that ransoms in 2011 amounted to $135 million).

25. Report on Somalia and Eritrea, *supra* note 20, at 221.

26. Report on Somalia and Eritrea, *supra* note 20, at 221.

27. Report on Somalia and Eritrea, *supra* note 20, at 222.

28. Report on Somalia and Eritrea, *supra* note 20, at 223.

29. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxiv.

30. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxiv.

31. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxiv.

political figures play an indirect, yet powerful role in the viability of Somali piracy; and they are compensated accordingly.[32] It is estimated that commanders and instigators in Somali piracy business split 70 to 86 percent of piracy proceeds with these stakeholders, without support of whom anchorage of hijacked boats would not be feasible."[33] Generally speaking then, the category of individuals who facilitate acts of piracy, whether directly or indirectly, is very broad. It includes not only those individuals who instigate and command piracy operations, but also those who supply political capital[34] and share profits with the pirates themselves. A staggering majority of the piracy profits—up to an estimated 86 percent—end up compensating the individuals who supply political capital.[35]

Certainly the ability of international forces to prosecute pirate negotiators, as well as those who provide political capital to pirate networks, would begin to address the root of the piracy problem rather than the symptoms. This recognition has led to increased efforts to combat piracy at its source.[36] For example, Contact Group on Piracy off the Coast of Somalia created Working Group 5 which, under the guidance of Italy, "coordinates international efforts to identify and disrupt the financial networks of pirate leaders and their financiers."[37] Regional efforts have also culminated in the creation of the Regional Anti-Piracy Prosecutions and Intelligence Co-ordination Centre (RAPPICC) located near Victoria in Seychelles.[38] The Centre will seek to separate pirate foot soldiers from the

---

32. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxiv.

33. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxiv, xxv.

34. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 7 (including officials, militia commanders, religious leaders, members of local communities, clan representatives).

35. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 8. "After carefully calibrating the returns to labor and capital that compensate participants for high risks involved in pirate ventures, it was found that up to 86 percent of ransom proceeds go to remunerate individuals, inside and outside the industry, whose political and social connections allow Somali piracy to thrive." PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 8.

36. Thomas Kelly Remarks, *supra* note 8; *see also* S.C. Res. 2020, ¶ 5, U.N. Doc. S/RES/2020 (Nov. 22, 2011) ("Recognizing the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks . . . .") (alteration added).

37. *Working Group 5*, CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA, http://www.thecgpcs.org/work.do?action=workAd (last visited Nov. 3, 2012, *archived at* http://perma.cc/TSE3-BDWC) (Working Group 5 has worked with INTERPOL to develop a customized Piracy database designed to provide information to law enforcement agencies across the globe as a means of facilitating piracy investigations); Thomas Kelly Remarks, *supra* note 8.

38. Thomas Kelly Remarks, *supra* note 8; *see also Regional Anti-Piracy Prosecutions and Intelligence Co-ordination Centre (RAPPICC)*, OCEANS BEYOND PIRACY, http://oceansbeyondpiracy.org/matrix/activity/regional-anti-piracy-prosecutions-intelligence-co-ordination-centre-rappicc (last visited Nov. 5, 2012, *archived at* http://perma.cc/FZE4-

higher-ups; indeed, RAPPICC will focus its efforts on facilitating the capture and prosecution of financers, investors, instigators, and ringleaders involved in Somali piracy.[39]

The United States, too, has increased efforts to disrupt pirate networks and prosecute high-ranking pirates. As former Secretary of State Hillary Clinton opined, "we may be dealing with a 17th century crime, but we need to bring 21st century solutions to bear."[40] In an effort to make kidnappings less profitable for pirates, the United States has begun to prosecute mid-level pirate negotiators. Highlighting this effort are the recent prosecutions of two pirate negotiators: Mohammad Saaili Shibin and Ali Mohamed Ali.

On April 13, 2011, Mohammad Saaili Shibin had his initial appearance in the US District Court for the Eastern District of Virginia after his arrest in Somalia and extradition to the United States.[41] On August 13, 2012, Shibin received ten concurrent and two consecutive life sentences from a US federal court for his role as a negotiator in the hijacking of the German-owned M/V/ *Marida Marguerite* and the *Quest*, a US-flagged vessel with four US citizens aboard.[42] Following these convictions, Shibin filed an appeal with the US Fourth Circuit Court of Appeals.[43] In his appeal, Shibin argued that his convictions should be overturned because he never negotiated while personally on the high seas.[44] The Fourth Circuit rejected this argument, holding that "conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas."[45] Consequently, the Fourth Circuit upheld Shibin's conviction.[46]

The second case commenced in April of 2011 when Ali Mohamed Ali was arrested at Dulles International Airport as he made his way to an education conference.[47] Later that month, on April 29th, a grand jury

---

M784).

39. Thomas Kelly Remarks, *supra* note 8; *see also Regional Anti-Piracy Prosecutions and Intelligence Co-ordination Centre (RAPPICC)*, *supra* note 38.

40. Hillary Rodham Clinton, Sec'y of State, Remarks at the Announcement of Counter-Piracy Initiatives (Apr. 15, 2009), *archived at* http://perma.cc/P5BZ-XY6Q.

41. Bruce Zagaris, *U.S. Indicts Somali Hostage Negotiators after FBI Snatches Him in Somalia,* 27 INT'L ENFORCEMENT L. REP. 752 (2011); *see also* Keith Johnson, *FBI Snatches Alleged Pirate Inside Somalia*, WALL STREET JOURNAL (Apr. 14, 2011), http://online.wsj.com/article/SB10001424052748704547804576261301548767880.html#, *archived at* http://perma.cc/5VF8-3RR3.

42. Press Release, U.S. Attorney's Office Eastern District of Virginia, Alleged Somali Hostage Negotiator Charged with Piracy, Kidnapping Charges (Apr. 13, 2011); United States v. Shibin, 722 F.3d 233, 235 (4th Cir. 2013).

43. Brief of Defendant-Appellant, United States v. Shibin, 722 F.3d 233 (4th Cir. 2013) (No. 12-4652) [hereinafter Shibin Brief], *archived* at http://perma.cc/NHD8-ED4P.

44. *Id.*

45. *Shibin*, 722 F.3d at 241.

46. *Id.* at 249.

47. *Somali Man Arrested for Negotiating Ransom of Danish Ship,* MARITIME EXECUTIVE (Apr. 25, 2011), http://www.maritime-executive.com/article/somali-man-arrested-for-

charged Ali with conspiracy to commit piracy under the law of nations; aiding and abetting piracy; an attack to plunder a vessel and aiding and abetting; and hostage taking and aiding and abetting.[48] The arrest stemmed from Ali's role as a ransom negotiator in the hijacking of the M/V *CEC Future*, a Bahamian-flagged cargo ship owned by Clipper Group A/S, a Danish company.[49] At the district court level, Judge Ellen Huevelle granted, in part, Ali's motion to dismiss charges of aiding and abetting piracy—ruling that such conduct is limited to events that occur on the high seas.[50] Ali has yet to stand trial for any piracy charges; however, the US Court of Appeals for the District of Columbia found that Ali could be charged as a pirate notwithstanding the fact that his acts of facilitating piracy likely did not occur on the high seas.[51]

C. The Current Issues Associated with the Prosecution of High-Ranking Pirates

The arrests and subsequent prosecutions of both Shibin and Ali are novel in two respects. First, both cases involve the prosecution of individuals serving as negotiators, a role that the United States has not sought to prosecute before 2011.[52] According to US Attorney for the Eastern District of Virginia Neil H. MacBridge, Shibin's arrest marks the first time that the US government has prosecuted an alleged pirate acting in a leadership role as a hostage negotiator.[53] Second, Ali's case marks the first time that the US government has relied solely on universal jurisdiction to prosecute a Somali pirate.[54] At the district court level, the *Shibin* and *Ali* cases produced seemingly divergent results. Indeed, facing charges that would carry a mandatory life sentence, Ali was released on bail after a contentious status hearing conducted on July 20, 2012, drawing a bemused remark from one commentator: '"I can't think of any case in U.S. history or in any other Somali pirate trial in the world where an alleged pirate has

---

negotiating-ransom-of-danish-ship, *archived at* http://perma.cc/ZZ95-F7Y6.

48. Grand Jury Indictment, United States v. Ali, 2011 WL 2731965 (D.D.C.) (No. 11-00106).

49. United States v. Ali, 870 F. Supp. 2d 10, 15 (D.D.C. 2012).

50. United States v. Ali, 885 F. Supp. 2d 17, 21 (D.D.C. 2012), *vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012) *rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013), and *aff'd in part*, 718 F.3d 929 (D.C. Cir. 2013).

51. *Ali*, 718 F.3d at 947.

52. Press Release, U.S. Attorney's Office Eastern District of Virginia, *supra* note 42.

53. Press Release, U.S. Attorney's Office Eastern District of Virginia, *supra* note 42.

54. Eugene Volokh, *From Prof. Eugene Kontorovich, About Today's Piracy Decision*, VOLOKH CONSPIRACY (July 12, 2012, 5:50 PM), http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/, *archived at* http://perma.cc/7PDY-J7KA; Jon Bellish, *A High Seas Requirement for Pirate Facilitators Under UNCLOS?*, VIEW FROM ABOVE (Aug. 16, 2012), http://djilp.org/2449/a-high-seas-requirement-for-pirate-facilitators-under-unclos/, *archived at* http://perma.cc/3M6H-FWKS.

been allowed out on bail pending trial."[55] However, recent rulings[56] at the federal appellate level have seemingly solidified the legality of prosecuting pirate negotiators for the time being—it seems that the United States can prosecute Somali pirate negotiators, even if the only basis for jurisdiction is universality.[57]

This Note attempts to provide some background to US efforts to prosecute pirate negotiators and high-ranking pirates. It dissects the arguments surrounding the question of whether acts of negotiation must themselves be committed on the high seas—referred to throughout this Note as the "high seas"[58] requirement.[59] Part II begins with the piracy provision in the US Constitution and traces its evolution through legislative enactments and case law. Part III examines the international framework governing the law of piracy to determine the "law of nations" definition of piracy as referred to in 18 U.S.C. § 1651. Specifically, Part III considers the Harvard Research in International Law Draft Convention on Piracy (Harvard Draft Convention), the 1958 Geneva Convention on the High Seas, (High Seas Convention) and the United Nations Convention on the Law of the Sea (UNCLOS). Then, in Part IV, this Note analyzes the legality of prosecuting pirate negotiators by viewing current cases through the prism of the domestic and international framework delineated in Part III. In particular, Part IV engages in a comparative analysis of the arguments raised by the parties involved in the prosecutions of Ali Mohamed Ali and Mohammad Saaili Shibin—in light of the requirements of 18 U.S.C. §§ 1651 and 2, UNCLOS Article 101(c), and recent federal appellate

---

55. Carrie Johnson, *Judge Orders Release of Man Accused of Negotiating on Behalf of Somali Pirates*, NPR (July 24, 2012), http://www.npr.org/blogs/thetwo-way/2012/07/24/157320860/judge-orders-release-of-man-accused-of-negotiating-on-behalf-of-somali-pirates, *archived at* http://perma.cc/BSX5-CR6T.

56. United States v. Shibin, 722 F.3d 233 (4th Cir. 2013); *Ali*, 718 F.3d 929.

57. *See generally Shibin*, 722 F.3d 233; *Ali*, 718 F.3d 929.

58. The term "high seas" has a particular geographic meaning within the context of the United Nations Convention on the High Sea. The "high seas" includes the sea not deemed to be within state territorial jurisdiction. Regarding territorial jurisdiction, article 3 provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." United Nations Convention on the Law of the Sea art. 3, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

59. A second, related question asks whether acts of negotiation themselves constitute piracy, or if piracy is limited to robbery on the high seas; however, this issue is outside the scope of this Note. This issue came to a head in United States v. Dire, and it appears as though the Supreme Court will not weigh in on the matter. 680 F.3d 446 (4th Cir. 2012); *see* Lyle Denniston, *Piracy and the Court—Act II,* SCOTUS BLOG (Oct. 21, 2012, 9:06 PM), http://www.scotusblog.com/2012/10/piracy-and-the-court-act-ii/, *archived at* http://perma.cc/X4SW-KM66; Julia Zebley, *Supreme Court Rejects Maritime Piracy Petitions,* JURIST (Jan. 23, 2013), http://jurist.org/paperchase/2013/01/supreme-court-rejects-maritime-piracy-petitions.php, *archived at* http://perma.cc/VW6D-ARKD.

decisions.

Finally, informed by the discussion of the *Shibin* and *Ali* cases, Part V discusses this Note's recommendations. This Note concedes that, as a matter of law, it is likely permissible to charge and prosecute individuals who facilitate acts of piracy, but never themselves enter the high seas. However, this Note cautions against pursuing such prosecutions. Instead of prosecuting pirate facilitators in US federal courts, this Note recommends that the United States defer to the international community to prosecute pirate negotiators and facilitators. First, this position is supported by the rationales underlying the exercise of universal jurisdiction. Second, deferring to the international community to prosecute high-ranking pirates would foster respect for Somali territorial jurisdiction by enhancing predictability and preventing the slippery slope towards potentially absurd prosecutions. Simply put, using US federal courts to prosecute high-ranking Somali pirates is not a sustainable anti-piracy model.

II. BACKGROUND TO THE LEGAL FRAMEWORK FOR PIRACY LAW IN THE UNITED STATES

A. Piracy under The US Constitution: The "Define and Punish" Clause

Article I of the US Constitution vests power with the US Congress "[t]o define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."[60] Clause ten addresses three discrete classes of crimes: "universal jurisdiction (piracies), extraterritorial crimes (felonies on the high seas), and violations of international law."[61] As commentators have argued, the history and text of clause ten suggest that piracy was considered a unique crime precisely because it was subject to universal jurisdiction.[62]

On its face, it seems odd that the language of clause ten would use both "piracies" and "felonies" because in 1776 the term "felony" would have included the entire category of crimes labeled "piracy."[63] Therefore, it is significant that the drafters[64] of clause ten used the terms "piracies" and "felonies," and thereby created a "double redundancy."[65] Assuming that

60. U.S. Const. art. I, § 8, cl. 10.

61. Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. REV. 149, 150-51 (2009).

62. *Id.*

63. *Id.* at 160.

64. *Id.* at 164 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 473-74 (Adrienne Koch ed., 1966)) (noting that "felony at common law" was a vague term, but not so with piracy, and referring to historic statutes on the subject).

65. Kontorovich, *supra* note 61, at 160 ("By the late seventeenth century, felony had come to mean any very serious crime, especially those punishable by death." (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 71 (writing that statutes have made piracy a

Constitutional construction requires giving each word meaning, if "Offenses" and "Felonies" were categorically equivalent to "Piracies,"then the word "Piracies" would be rendered superfluous.[66] That is to say, if all "piracies" could be referred to as "felonies," then use of the word "piracies" would be meaningless—an interpretation that does not comport with a fundamental tenant of constitutional construction: words have meaning. Constitutional interpretation requires interpreting the language from clause ten as having some non-redundant meaning; as commentators have observed, it requires inquiry into why the Constitution might treat piracy differently from other felonies and other offenses against the law of nations.[67] The fundamental difference between "piracies" and "felonies" and "other offenses" is that piracy has a unique jurisdictional scope.

In The Federalist 42, James Madison briefly addressed the respective categories of "piracies," felonies on the high seas," and "offenses against the law of nations."[68] Madison briefly discussed the meaning of "piracies" which appears to simply anticipate the establishment of courts.[69] He provided the following comments:

> The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes.[70]

Madison was able to provide a more concrete definition of "felonies on the high seas":

> Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws.

"felony" in English law)).

66. Kontorovich, *supra* note 61, at 164.

67. Kontorovich, *supra* note 61, at 164.

68. THE FEDERALIST NO. 42 (James Madison).

69. *Id.*

70. *Id.*

> For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper.[71]

Finally, regarding offenses against the law of nations, Madison had the following to say: "These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."[72]

1. Traditional Sources of Jurisdiction

There are four traditional theories of jurisdiction under the law of nations: territorial, national, passive personality, and protective jurisdiction.[73] Territorial jurisdiction—the most essential manifestation of state sovereignty—allows a state to exercise jurisdiction over conduct occurring within its own territory, or on ships that it has registered.[74] States, however, may also exercise extraterritorial jurisdiction. The national principle for jurisdiction allows a state to exercise jurisdiction over the conduct of its own nationals even if such conduct occurs outside its own territory; similarly, the passive personality theory allows a state to exercise jurisdiction over individuals who commit criminal acts against its citizens.[75] The national principle and the passive personality theory are inversely related—the national theory conditions jurisdiction on the nationality of the criminal actor; conversely, the passive personality theory conditions jurisdiction on the nationality of the victim.[76] Finally, under the protective principle for jurisdiction, a state may exercise jurisdiction over conduct outside its territory that is directed against a critical state interest. [77] For example, an anti-trust conspiracy directed against a state's interest would likely constitute a basis for the exercise of jurisdiction under the protective

---

71. *Id.*

72. *Id.*

73. United States v. Hasan, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)-(2) (1986)).

74. *Id.*

75. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)-(2) (1986)).

76. *Id.; see also* Chau Han Mow v. United States, 730 F.2d 1308, 1311 (9th Cir. 1984) (applying the protective personality principle to obtain subject matter jurisdiction over acts of conspiracy).

77. *See* United States v. Yousef, 327 F.3d 56, 110 (2d Cir. 2003) (applying the "protective principle" of jurisdiction to a defendant who planned to bomb United States commercial aircraft abroad).

principle.[78]

2. Universal Jurisdiction: General Piracy Versus Municipal Piracy

a. General Piracy

The crime of piracy, from as early as the seventeenth century, was considered a crime with a unique jurisdictional scope.[79] In large part, the unique jurisdictional scope of piracy comes from a bifurcated meaning of the very term "piracy."[80] In one sense, "piracy" can mean general piracy, as it relates to a crime under public international law.[81] In a different sense, the term "piracy" can refer to a crime under municipal law.[82] General piracy is piracy in violation of the law of nations, whereas municipal piracy is piracy in violation of some State's domestic law.[83] In this Note, municipal piracy will refer to the US domestic piracy provision contained in section 1651. Use of the term piracy in the general piracy sense comes from the historic notion that piracy is a crime subject to universal jurisdiction.[84] Indeed, pirates have traditionally been referred to as "*hostis humani generis*," a phrase meaning "common enemies of all mankind."[85] Since the early seventeenth century, piracy has been considered the only universal jurisdiction offense.[86] General piracy, as an international crime, grants all States jurisdiction over the pirate, regardless of where the pirate was captured, so long as it was on the high seas.[87]

There are at least two main rationales for allowing universal jurisdiction over the crime of piracy. The first rationale relies on a logical connection between the crime of piracy and the geographical location of

78. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 189 (2004).

79. *Id.*

80. *Id.*

81. Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925); Kontorovich, *supra* note 61, at 164.

82. Dickinson, *supra* note 81; Kontorovich, *supra* note 61, at 164. Indeed, the Harvard Researchers who organized the Harvard Draft Convention on Piracy recognized this distinction: "[P]iracy under the law of nations and piracy under municipal law are entirely different subject matters and . . . there is no necessary coincidence of fact-categories covered by the term in any tow systems of law." ALFRED RUBIN, THE LAW OF PIRACY 336 (2d ed. 1998) (citing J. Bingham et al., *Harvard Research in International Law: Draft Convention on Piracy*, 26 AM. J. INT'L L. SUPP. 739, 749 (1932)) (alterations added).

83. United States v. Dire, 680 F.3d 446, 455 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 982 (2013).

84. Dickinson, *supra* note 81; Kontorovich, *supra* note 61, at 164.

85. RUBIN, *supra* note 82, at 17; *see id.* at 91-95 for a description of the origins of the phrase. *See also* EDWARD COKE, 3 INSTITUTES ON THE LAWS OF ENGLAND 113 (1797).

86. Kontorovich, *supra* note 61, at 164; Kontorovich, *supra* note 78, at 190.

87. Dickinson, *supra* note 81, at 356.

"high seas:" pirates, who operate on the high seas, endanger the trade and commerce of all countries because they do not discriminate among their victims based on nationality.[88] For example, "cargo ships are usually owned by a corporation in one state, fly the flag of a second state, and carry cargo destined for multiple other states."[89] A pirate attack on such a cargo ship would simultaneously affect the interests of all three States. Consequently, because all States have an interest in maintaining safe channels for commerce on the high seas, it follows that all States should be able to prosecute pirates who may threaten that commerce.

Second, pirates, by definition, do not serve the interests of any home country; consequently, no government will protest if another country seeks to prosecute individuals caught in the act of piracy.[90] Other commentators have articulated this rationale in a slightly different way: when individuals commit acts of piracy they lose their nationality by their very acts—they become "de-nationalized."[91] A pirate who has been de-nationalized can no longer be subjected to the national jurisdiction of his or her former state of nationality; thus, other countries must be able to assert jurisdiction to fill this jurisdictional void.[92] Regardless of the rationale, the essence of universal jurisdiction remains largely the same: pirates do not have allegiance to any one State, and because they harm the interests of multiple States, they are considered to be the enemy of all States.[93]

B. US Municipal Piracy Laws

US municipal piracy, on the other hand, can consist of virtually any offense the US Congress chooses to define through statute; however, it is possible for a crime to be labeled "piracy" under municipal law but still not be a crime subject to universal jurisdiction.[94] In other words, labeling a crime "piracy" does not automatically qualify that crime as one subject to universal jurisdiction.[95] A State may only invoke universal jurisdiction over general piracy when its municipal statute reflects the definition of piracy derived from international consensus.[96] That is to say, a State may dub any

88. Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 252 (2010) (citing United States v. Yousef, 327 F.3d 56, 104 (2d Cir. 2003)).

89. *Id.*

90. *Id.*

91. ROBIN GEISS & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA 146 (2011).

92. *Id.*

93. RUBIN, *supra* note 82, at 17.

94. Kontorovich, *supra* note 61, at 166; Kontorovich, *supra* note 78, at 190; United States v. Hasan, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010) (citing Dole v. New England Mut. Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864)).

95. Kontorovich, *supra* note 61, at 166.

96. *See Hasan*, 747 F. Supp. 2d at 606.

conduct piracy, but that State only obtains universal jurisdiction over the conduct when it is also defined by the law of nations as piracy. For example, the US Congress could codify a crime with the elements of common law battery and call it "piracy;" but labeling the crime "piracy" would not give US courts jurisdiction over foreigners who commit batteries on the high seas. Universal jurisdiction only arises to the extent that the US municipal statute and the "law of nations" overlap.[97]

1. The Act of 1790

On April 30, 1790, Congress passed its first substantive piracy provision.[98] Congress passed the Act of 1790 "for the punishment of certain crimes against the United States."[99] Section 8 of the Act dealt specifically with the crime of piracy, providing:

> That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death. . . .[100]

Section 8 can be divided into three different classes of piracy, each with a distinct definition.[101] All three definitions, however, penalize the crime of piracy with a sentence of death.[102] The first class of piracy discussed in section 8 includes "any persons" who commit acts of piracy.[103]

---

97. *Id.*
98. Act of Apr. 30, 1790, § 8, 1 Stat. 112 [hereinafter Act of 1790].
99. *Id.*
100. *Id.*
101. Dickinson, *supra* note 81, at 343.
102. Dickinson, *supra* note 81, at 343.
103. "That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any

The second class includes "any captain or mariner of any ship or other vessel."[104] Finally, the third class includes "any seaman" who "shall lay violent hands upon his commander."[105] The section 8 definition of piracy appeared to recognize the applicability of universal jurisdiction to the crime of piracy for the prosecution of individuals from any country; however, the failure of section 8 to criminalize piracy consistent with international law limited its jurisdictional scope.[106] Indeed, the problems with section 8 of the Act of 1790 became evident in the Supreme Court case of *United States v. Palmer* which will be discussed *infra* in Part C.[107]

2. The Congressional Act of 1819

On March 3, 1819, the year after the *United States v. Palmer* decision, Congress passed the Congressional Act of 1819.[108] The Act of 1819 was a Congressional Act "to protect the commerce of the United States, and punish the crime of piracy."[109] Section 5 of the Act of 1819 dealt with piracy in particular, criminalizing the following acts:

> That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.[110]

The initial Act of 1819 was limited in time to one year, but was

---

other offence which if committed within the body of a county, would by the laws of the United States be punishable with death . . . ." Act of 1790, *supra* note 98 (alteration added).

104. "[O]r if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate . . . ." Act of 1790, *supra* note 98 (alterations added).

105. "[O]r if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." Act of 1790, *supra* note 98 (alteration added).

106. Dickinson, *supra* note 81, at 344.

107. United States v. Palmer, 16 U.S. 610, 611 (1818).

108. Act of Mar. 3, 1819, ch. 77, 3 Stat. 510 [hereinafter Act of 1819].

109. R. CHUCK MASON, CONG. RESEARCH SERV., R41455, PIRACY: A LEGAL DEFINITION 2 (2010).

110. Act of 1819, *supra* note 108, § 5.

eventually continued by section 2 of an act passed on May 15, 1820.[111]

The Act of 1819 marked a shift from a specific definition of piracy, as initially enunciated in the 1790 Act, to a definition of piracy by reference to the "law of nations."[112] Under the 1790 Act a crime of robbery—committed by a person on the high seas, on board a foreign vessel, and against a person from a foreign state—would not have qualified as piracy within the statutory definition. In other words, the Act of 1790 limited the power of US courts to exercise universal jurisdiction over individuals deemed to be pirates by virtue of the "law of nations." The 1819 Act, by reference to the "law of nations," ameliorated problems with the 1790 Act by expanding the US municipal statute to track international developments in the definition of piracy.[113]

3. The Act of 1820

In 1820, Congress reenacted the Act of 1819 as "[a]n act to protect the commerce of the United States, and punish the crime of piracy."[114] Section 2 of the 1820 Act largely replicated section 5 of the 1819 Act by reinstating that section; section 2 provided "[t]hat the fifth section of the said act [of 1819] be, and the same is hereby continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects or fully as if the duration of the said section had been without limitation."[115]

In addition, section 3 of the Act of 1820 explicitly addressed piracy in the following way:

> That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river

111. RUBIN, *supra* note, 82, at 144-45 (citing Act May 25, 1820, ch. 113, 3 Stat. 600,16th Cong., 1st Sess.).

112. RUBIN, *supra* note, 82, at 145.

113. The court in United States v. Chapels referred to the Act of 1790 as containing an omission, therefore requiring an additional congressional statute to amend the problem: "To supply this omission, a new provision was deemed to be necessary; and it is understood, that with this intention the last congress adopted the 5th section of the 'act to protect the commerce of the United States, and punish the crime of piracy,' passed on the 3d of March, 1819 [3 Stat. 513]." United States v. Chapels, 25 F. Cas. 399 (C.C.D. Va. 1819).

114. Act of May 15, 1820, ch. 77, §§ 1-2, 3 600 Stat. [hereinafter Act of 1820]. It provided that section 5 of the Act of 1819 should be "continued in force" without limitation as to time "as to all crimes made punishable by the same, and heretofore committed." RUBIN, *supra* note 82, at 381. Notably, the Act of 1820 made it "piracy" for an American to be engaged in the international slave trade which presumably represented an attempt "to develop the international law, the 'law of nations,' by changing the municipal law of the United States, with the goal that the international community would reciprocate; however, to that extent it failed." *Id*. at 163.

115. RUBIN, *supra* note 82, at 381.

> where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death:
>
> *Provided,* That nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court.[116]

Commentators note that, based on the language contained in section 3, Congress likely intended section 5 of the Act of 1819 to supersede section 8 of the Act of 1790;[117] moreover, section 3 of the Act of 1820 was likely intended to supersede section 5 of the Act of 1819.[118] Oddly, section 8 of the Act of 1790, section 5 of the Act of 1819, as well as section 3 of the Act of 1820, were reenacted in the Revised Statutes of 1874.[119]

4. 18 U.S.C. §§ 1651 and 2: The Modern Piracy Statutes

Final changes to the US definition of piracy occurred in 1909 in the Federal Criminal Code.[120] The 1909 Federal Criminal Code was "[a]n [a]ct: To codify, revise, and amend the penal laws of the United States."[121] It repealed section 8 of the Act of 1790 and established the definition provided in section 5 of the Act of 1819.[122] Currently, the law from 1909 is

116. RUBIN, *supra* note 82, at 381.
117. Dickinson, *supra* note 81, at 349.
118. Dickinson, *supra* note 81, at 349.
119. Dickinson, *supra* note 81, at 349.
120. *See* Dickinson, *supra* note 81, at 349 (discussing the changes made to the federal criminal code of 1909).
121. Act of March 4, 1909, § 290, 35 Stat. 1145 (alterations added).
122. *Id.*

codified as 18 U.S.C. § 1651.[123] It provides in full that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[124] Consequently, 18 U.S.C. § 1651 exports the definition of piracy to the "law of nations" definition.

Finally, 18 U.S.C. § 2 provides the following:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.[125]

The combination of 18 U.S.C. § 2 and 18 U.S.C. § 1651 provides the federal statutory basis for charging pirate negotiators and facilitators as principals.

C. The Early US Piracy Cases

1. United States v. Palmer

The US Supreme Court first interpreted a congressional enactment of a piracy provision in *United States v. Palmer*.[126] In *Palmer* the Supreme Court interpreted the Act of 1790 and consequently delineated, for the first time, the meets and bounds of piracy under congressional enactment.[127] The issues before the *Palmer* Court were twofold: first, the Court had to decide whether Congress intended for actions that would constitute robbery on land, but were committed on the high seas, to be considered piracy.[128] Second, the Court decided whether section 8 of the Act of 1790, which labeled as piracy "robbery" and "murder" committed by "any person or persons" on the high seas, could be considered piracy when it was applied to a non-US citizen on the high seas on a vessel belonging to the subject of a foreign State.[129]

In essence, the *Palmer* Court came to two conclusions regarding the Act of 1790. Regarding the first issue: piracy was the act of robbery, as

123. *See* Dickinson, *supra* note 81, at 349 (discussing the changes made to the federal criminal code of 1909.).
124. 18 U.S.C. § 1651 (1948).
125. 18 U.S.C. § 2 (1951).
126. United States v. Palmer, 16 U.S. 610, 627 (1818).
127. *See generally id.*; *see also* Dickinson, *supra* note 81, at 344.
128. *Palmer*, 16 U.S. at 627.
129. *Id.* at 632-33.

recognized and defined by common law, committed on the high seas.[130] In response to the second issue, the Court found that the crime of robbery by a non-US citizen committed on the high seas on board a vessel owned by a subject of a foreign State was not considered piracy under the Act of 1790 and, therefore, was not subject to punishment in US courts.[131] In other words, because the Act of 1790 had not criminalized piracy as an offense against international law, the United States could not invoke universal jurisdiction to prosecute the foreign nationals under section 8 of its municipal statute.[132] Ultimately, the deficiencies of the Act of 1790 laid the foundation for the Act of 1819 and eventually a decision by the Supreme Court in *United States v. Smith*.

2. United States v. Smith

In 1820, the US Supreme Court decided *United States v. Smith;* the Court considered the Act of 1819 to determine whether "plunder and robbery" constituted piracy by the law of nations, punishable under section 5 of the Act of 1819.[133] The defendant in *Smith* had confined the officer of a ship commissioned by the government of Buenos Aires while in port, and then robbed the vessel while on the high seas.[134] The defendant was captured and charged with piracy under section 5 of the Act of 1819.[135] Consequently, the issue before the Court was whether section 5, relying on the "law of nations" for a definition of piracy, was a proper exercise of congressional authority under the "define and punish" clause of the Constitution.[136]

Unlike the piracy proscription contained in the Act of 1790, the piracy proscription in the Act of 1819 criminalized piracy through specific reference to the "law of nations."[137] Therefore, the Court held that an act punishing "the crime of piracy, as defined by the law of nations," was within Congress's constitutional authority to "define and punish" since it adopted by reference the sufficiently precise definition of piracy under international law: the act of "robbery upon the sea."[138] In other words, Justice Story reasoned that the explicit reference to the law of nations was tantamount to listing the elements of piracy clearly within the statute.[139]

130. *Id.* at 629.
131. MASON, *supra* note 109.
132. *See Palmer*, 16 U.S. 610, at 633-34.
133. United States v. Smith*,* 18 U.S. 153, 155 (1820).
134. *Id.* at 154.
135. *Id.* at 155.
136. *Id.* at 158.
137. Act of 1819, ch. 77, § 5, 3 Stat. 510.
138. MASON, *supra* note 109, at 3.
139. *Smith,* 18 U.S. at 159-60.

Next, the Court considered what crimes constituted piracy under the "law of nations."[140] It considered three sources to determine how the law of nations defined piracy. The Court considered "the works of jurists, . . . the general usage and practice of nations . . . , [and] . . . judicial decisions recgonising and enforcing [the law of nations on piracy]."[141] The Court concluded that there was sufficient agreement that "robbery, or forcible depredations upon the seas, *animo furandi*, is piracy;" therefore, it concluded that the reference to the law of nations in section 5 of the Act of 1819 was proper.[142]

III. THE CUSTOMARY INTERNATIONAL LAW DEFINITION OF PIRACY: THE INTERNATIONAL FRAMEWORK GOVERNING PIRACY

Commentators generally agree that the definition of piracy under the "law of nations" is found in UNCLOS.[143] This Note addresses two main reasons for this conclusion. First, the UNCLOS definition embodied in article 101 has gained wide acceptance by the international community. Second, recent US case law corroborates the view that UNCLOS article 101 provides the law of nations definition of piracy.

The international community appears to have accepted the UNCLOS article 101 definition of piracy.[144] In 2011 the United States drafted UN Resolution 2020, which reaffirmed that UNCLOS sets forth the legal framework for prosecuting piracy and armed robbery at sea as well as regulating other ocean activities.[145] Resolution 2020, therefore, provides strong evidence that the international community relies on UNCLOS article 101 for the current international definition of piracy.[146]

Second, US case law seems to endorse US acceptance of the piracy definition set forth in UNCLOS, as well as the High Seas Convention before it.[147] In the 2012 decision of *United States v. Dire*, the US Fourth Circuit Court of Appeals endorsed the conclusion provided by the US District Court for the Eastern District of Virginia in *United States v. Hasan*, that "the definition of general piracy under modern customary international

---

140. *Id.* at 160-62.

141. United States v. Hasan, 747 F. Supp. 2d 599, 616 (E.D. Va. 2010), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012) (quoting *Smith,* 18 U.S. at 160-61).

142. *Hasan*, 747 F. Supp. 2d at 616 (quoting *Smith,* 18 U.S. at 162).

143. Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?*, 86 TUL. L. REV. 1111, 1121 (2012) (citing Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia*, 20 EUR. J. INT'L L. 399, 401 (2009)).

144. S.C. Res. 2020, *supra* note 36, ¶ 7; *see also* United States v. Dire, 680 F.3d 446, 469 (4th Cir. 2012) (noting the "utmost significance" of the Resolution of 2020).

145. S.C. Res. 2020, *supra* note 36.

146. *Dire*, 680 F.3d at 469.

147. *Id.* at 468.

law is, at the very least, reflected in Article 15 of the 1958 High Seas Convention and Article 101 of the 1982 UNCLOS."[148]

In concluding that UNCLOS provides the current definition of piracy under the law of nations, the *Dire* court largely adopted the rationale from *United States v. Hasan.*[149] In *Hasan,* the court noted that treaties could create legal obligations on the States that are parties to them.[150] As the *Hasan* court put it, "a treaty will only constitute *sufficient proof* of a norm of *customary international law* if an *overwhelming majority* of states have ratified the treaty, *and* those states uniformly and consistently act in accordance with its principles."[151] The *Hasan* court, however, went on to state that "it is also important to understand that a treaty can either 'embod[y] or create[ ] a rule of customary international law,' and such a rule 'applies beyond the limited subject matter of the treaty and *to nations that have not ratified it.*'"[152]

Considering the general acceptance of UNCLOS, the *Hasan* court concluded that UNCLOS's definition of piracy represented a "widely accepted norm."[153] It reasoned that "[t]he 161 states parties to UNCLOS represent the 'overwhelming majority' of the 192 Member States of the United Nations, and the 194 countries recognized by the United States Department of State."[154] The United States did not pursue ratification of UNCLOS in the 1980s or 1990s based on concerns about the deep seabed mining provisions.[155] However, it is not dispositive for the US's determination of "piracy" that the United States has not signed or ratified UNCLOS because the United States has acceded to the provisions regarding "traditional uses" of the ocean.[156] Indeed, in a transmittal letter, President Bill Clinton addressed the US Senate stating that "Articles 100-107 reaffirm the rights and obligations of all states to suppress piracy on the high seas;" he also emphasized that Congress had exercised its constitutional power to criminalize piracy through Section 1651.[157] Consequently, both international agreement and US case law interpreting international consensus appear in harmony that UNCLOS article 101 provides the current law of nations definition of piracy for purposes of 18

148. *Hasan*, 747 F. Supp. 2d at 632-33, *aff'd sub nom. Dire*, 680 F.3d 446.

149. *Dire*, 680 F.3d at 461 (citing *Hasan*, 747 F. Supp. 2d at 633).

150. *Hasan*, 747 F. Supp. 2d at 633.

151. *Id*. (emphasis added).

152. *Id.* at 633 (alterations added).

153. *Id.* at 634.

154. *Id.* at 633-34.

155. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §103 reporter's note 2 (1986).

156. *Hasan*, 747 F. Supp. 2d at 634.

157. *See* U.S. DEPT. OF STATE, DISPATCH SUPPLEMENT, LAW OF THE SEA CONVENTION: LETTERS OF TRANSMITTAL AND SUBMITTAL AND COMMENTARY 18 (1995).

U.S.C. § 1651.[158]

A. International Treaties: The Harvard Draft Convention, the Geneva Convention, and UNCLOS

The current "law of nations" definition of piracy is contained in UNCLOS article 101;[159] however, the textual lineage of UNCLOS dates back to the High Seas Convention, and even further to the Harvard Draft Convention on Piracy before that.[160] Consequently, an overview of these predecessor statutes helps provide the necessary context for a discussion of the current piracy provisions contained in the text of UNCLOS article 101.

1. Piracy Under the Harvard Research in International Law Draft Convention on Piracy

Published in 1932, The Harvard Draft Convention was an effort to consider the international law of piracy in preparation for a major codification, and the creation of a special jurisdiction for sea piracy.[161] Although not an international agreement itself, the Harvard Draft Convention anticipated future codification—thus, it was intended "as an aid to the attempts of the time to 'codify' the rules of international law as they ought to exist rather than as they could be shown to exist by an examination of theory and past practice."[162] To this end, article 2 provides that "[e]very state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy."[163] Indeed, the very theme of the draft was to define the meets and bounds of the universal jurisdiction over pirates.[164]

The text of the Harvard Research Draft Convention sets forth a definition of piracy in article 3:

---

158. UNCLOS art. 101 appears to be the readily accepted contemporary definition of piracy under the law of nations. *See* United States v. Ali, No. 11-0106, 2012 WL 2870263 (D.D.C. July 13, 2012), *opinion vacated in part*, No. 11-0106, 2012 WL 3024763 (D.D.C. July 25, 2012).

159. See discussion *supra* in Part III.

160. Shibin Brief, *supra* note 43, at 18; Jon Bellish, *Breaking News from 1932: Pirate Facilitators Must Be Physically Present on the High Seas*, EUR. J. INT'L. L: TALK! (Sept. 19, 2012), http://www.ejiltalk.org/breaking-news-from-1932-pirate-facilitators-must-be-physically-present-on-the-high-seas/#more-5662, *archived at* http://perma.cc/EZS2-F3WJ.

161. RUBIN, *supra* note 82, at 308; B.H. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 103 (1980).

162. RUBIN, *supra* note 82, at 309.

163. J. Bingham et al., *Harvard Research in International Law*: *Draft Convention on Piracy*, 26 AM. J. INT'L L. SUPP. 739, 768 (1932) [hereinafter *Harvard Research*].

164. *Id.* at 756.

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.[165]

Furthermore, article 6 limits jurisdiction to areas not within the territorial jurisdiction of a State by providing, "[i]n a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board."[166] Based on article 1, territorial jurisdiction is "the jurisdiction of a state under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory."[167] On the other hand, the "high seas" were defined as "that part of the seas which is not included in the territorial waters of any state."[168]

2. Piracy under the Geneva Convention on the High Seas

Created in 1958, the Geneva Convention on the High Seas (the High Seas Convention) serves as the first prominent international treaty governing the crime of piracy. The United Nations General Assembly asked the International Law Commission to draft a document that could form the predicate for an international agreement on the law of the sea—the result was the High Seas Convention.[169] The High Seas Convention appears to have been intended as a declarative authority on customary international law at the time of its inception.[170] Today the High Seas Convention has a

165. *Id.* at 743.
166. *Id.* at 744.
167. *Id.* at 743.
168. *Id.*
169. RUBIN, *supra* note 82, at 319.
170. The preamble seeks to "codify the rules of international law relating to the high

total of sixty-three states as parties, including the United States, which ratified the treaty on April 12, 1961.[171] Article 15 of the High Seas Convention contains the definition of piracy; as will be discussed *infra*, its language is virtually identical to the definition of piracy contained in UNCLOS article 101.

Turning to the text of article 15 of the High Seas Convention, piracy consists of any of the following acts:

> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> Any act of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.[172]

Finally, article 19 clearly establishes universal jurisdiction over the crime of piracy. It provides:

> On the high seas, or in any other place outside the jurisdiction of any state, every state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the state which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the property, subject to the rights of third states acting in good faith.[173]

Much of the language from UNCLOS unmistakably resembles the language from the High Seas Convention.[174]

---

seas." Geneva Convention on the High Seas, preamble, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 397 [hereinafter High Seas Convention], *archived at* http://perma.cc/UH9R-2A7Z.

171. *Id.*

172. *Id.* art. 15.

173. *Id.* art. 19.

174. *See* UNCLOS, *supra* note 58, art. 101.

3. The United Nations Convention on the Law of the Sea

The third United Nations Conference on the Sea convened in 1973. Resulting from the Conference was UNCLOS, which was a multilateral treaty adopted in 1982.[175] Currently, 166 states have ratified or acceded to the terms of UNCLOS.[176] The United States, however, has neither signed nor ratified its terms.[177] Article 101 provides the relevant definition of piracy which consists of any of the following acts:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State:
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[178]

Furthermore, article 105 of UNCLOS virtually replicates article 19 of the High Seas Convention and reaffirms the applicability of universal jurisdiction over the crime of piracy.[179] Finally, a ship becomes a pirate ship under article 103 "if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101."[180]

Based on the language of UNCLOS article 101, an act is piratical if the following four elements are proven: (a) a specified criminal "act" (b)

---

175. *See* UNCLOS, *supra* note 58, art. 101.

176. DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF THE LEGAL AFFAIRS, TABLE RECAPITULATING THE STATUS OF THE CONVENTION AND OF THE RELATED AGREEMENTS, AS OF 30 JAN. 2013 (2013), *archived at* http://perma.cc/82GL-CX72.

177. *Id.* at 8.

178. UNCLOS, *supra* note 58, art. 101.

179. "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith." UNCLOS, *supra* note 58, art. 105.

180. UNCLOS, *supra* note 58, art. 10.

committed for private ends (c) on the high seas[181] and (d) directed against another ship.[182]

a. The "Act" Requirement

First, piracy under UNCLOS article 101 requires the commission of some specific "act." Article 101 essentially creates three categories of acts that would satisfy this requirement.[183] Subsection (a) defines as piracy "illegal acts of violence or detention, or any act of depredation."[184] Subsection (b) goes further to include "voluntary participation" or "operation" of a ship that is used to commit acts of piracy.[185] Finally, subsection (c) would include as piracy "inciting" or "facilitating" acts of violence or detention against a ship.[186] Also included within each category are the mere acts of preparation or attempts at the acts themselves.[187]

b. Private Ends Requirement

Second, an act must be "committed for private ends."[188] The text of UNCLOS does not expressly define "private ends" and it remains somewhat unclear what the "private ends" requirement actually mandates.[189] Commentators have interpreted the ambiguity in two divergent ways. Some commentators have interpreted this requirement narrowly by arguing that the "private ends" requirement would only be met if the acts are not taken for political reasons.[190] Other commentators have interpreted the "private ends" requirement to encompass a larger category of activity; these commentators suggest that that the "private ends" requirement would not be met only when a government expressly authorizes the acts.[191] This

181. This element will be discussed in more detail in Part IV. However, it is important to note that the UNCLOS definition of piracy only includes acts that occur outside of a state's territorial jurisdiction which may extend twelve miles from its coastline. UNCLOS, *supra* note 58, arts. 2-3.

182. Dutton, *supra* note 143, at 1122.

183. Dutton, *supra* note 143, at 1122.

184. UNCLOS, *supra* note 58, art. 101(a).

185. UNCLOS, *supra* note 58, art. 101(b).

186. UNCLOS, *supra* note 58, art. 101(c).

187. Dutton, *supra* note 143, at 1122.

188. UNCLOS, *supra* note 58, art. 101(a).

189. Dutton, *supra* note 143, at 1122.

190. GEISS & PETRIG, *supra* note 91, at 61 (citing Clyde H. Crockett*, Toward a Revision of the International Law of Piracy*, 26 DEPAUL L. REV. 78, 80 (1976) ("Some authors maintain that the requirement simply excludes all acts committed for political reasons from the ambit of piracy.")).

191. Dutton, *supra* note 143, at 1122 (citing Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 27-37 (2007)).

second interpretation is broader because any act of violence that is not expressly sanctioned by a state would meet the "private ends" requirement if it had any political underpinning.[192] Nevertheless, it is conceivable that in the future, pirates could argue that their actions are politically motivated; if courts interpret the "private ends" requirement narrowly, then it is possible that the "private ends" requirement could exculpate some pirates.[193]

c. High Seas Requirement

Third, piracy under article 101 must occur on the "high seas," or "in a place outside the jurisdiction of any State."[194] The "high seas" requirement, which is particularly relevant to this Note, is referenced in UNCLOS article 3. Article 3 provides, "[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention."[195] Commentators agree that acts that fulfill all of the requirements contained in UNCLOS article 101, but that occur within a state's territorial jurisdiction are not considered piracy.[196] The "high seas" requirement, as it relates to the prosecution of pirate negotiators, will be discussed in more detail *infra* in Part IV.

d. Two Ships Requirement

Finally, because article 101(a)(i) includes the language "against another ship" there is a requirement that, for a conviction under article 101, an act of piracy must occur between two ships.[197] Although some commentators may disagree as to what the two ships requirement really means, there is a good body of scholarship indicating that piracy does not consist of "crew seizures, mutiny or passenger takeovers of one and the same vessel . . . ."[198] Indeed, the two-ship requirement contained in UNCLOS article 101 appears to be one of the primary motivations for adopting the Convention for the Suppression of Unlawful Acts Against the

192. GEISS & PETRIG, *supra* note 91, at 61.

193. GEISS & PETRIG, *supra* note 91, at 61; *see also* Dutton, *supra* note 143, at 1124.

194. UNCLOS, *supra* note 58, art. 101(a)(i)-(ii).

195. UNCLOS, *supra* note 58, art. 3.

196. GEISS & PETRIG, *supra* note 91, at 60; *see also* Dutton, *supra* note 143, at 1125.

197. UNCLOS, *supra* note 58, art. 101(a)(i).

198. GEISS & PETRIG, *supra* note 91, at 62; *see also* Dutton, *supra* note 143, at 1125 (citing, *inter alia*, Eugene Kontorovich, *International Decisions*, United States v. Shi, 103 AM. J. INT'L L. 734, 737 (2009) ("[S]tating that treaty language and the preparatory papers support a conclusion that the two ship requirement is meant to screen out mutiny or other internal disturbances by crew and passengers, whose acts would remain within the jurisdiction of the flag state to prosecute.") (alteration added)).

Safety of Maritime Navigation (SUA Convention).[199] The SUA Convention was adopted in reaction to acts of maritime terrorism that occurred entirely on board one ship—the Palestinian hijacking of the Italian cruise liner the *Achille Lauro* is the paradigm.[200] Unlike UNCLOS article 101, which requires two ships, article 3 of the SUA Convention prohibits both acts of intentional seizure and control of a ship and acts of violence against persons on board the ship, as well as attempts to engage in those acts.[201] Thus, while an offense under the SUA Convention may arise out of acts committed entirely on one ship, UNCLOS article 101 requires a showing that two or more ships have been involved.[202]

IV. ANALYSIS OF WHETHER THE ACT OF NEGOTIATING CONSTITUTES PIRACY UNDER THE "LAW OF NATIONS"

As discussed *supra* in Part III, UNCLOS article 101 provides the current "law of nations" definition of piracy for purposes of 18 U.S.C. § 1651. Under UNCLOS article 101(a)-(b), "any illegal act of violence or detention," or "any act of voluntary participation in the operation of a ship" satisfies the "act" requirement for a crime of piracy under UNCLOS 101.[203] Article 101(c) also includes "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[204] The current US cases of *United States v. Shibin* and *United States v. Ali* help define the scope of the high seas requirement under article 101.

In both *United States v. Shibin* and *United States v. Ali* the "private ends" and the "two ships" requirements are not at issue.[205] In *Shibin* there was no dispute that Mohammad Shibin did "incit[e]" or "intentionally facilitat[e]" acts of violence by negotiating ransom agreements.[206] Assuming Ali also "intentionally facilitated" acts of violence, the only remaining issue, at least when looking at US law to help determine international law, concerns the scope of the "high seas" requirement contained in UNCLOS article 101. Specifically, whether piracy under

---

199. GEISS & PETRIG, *supra* note 91, at 62.

200. Malvina Halberstam, *Terrorism on the High Seas: The* Achille Lauro*, Piracy and the Imo Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 291 (1988).

201. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Mar. 10, 1988, 27 I.L.M. 672, 1678 U.N.T.S. 222, *archived at* http://perma.cc/T8SL-BE7Y.

202. *Id.*; UNCLOS, *supra* note 58, art. 101(a)(1).

203. UNCLOS, *supra* note 58, art. 101(a)-(b).

204. UNCLOS, *supra* note 58, art. 101(c).

205. United States v. Shibin, No. 2:11CR33, 2012 WL 195012 (E.D. Va. Jan. 23, 2012); United States v. Ali, 870 F. Supp. 2d 10 (D.D.C. 2012).

206. The defendant, Shibin, confessed to his role in the hijacking of the M/V Marida Marguerite and the S/V Quest; furthermore, Judge Robert G. Doumar denied Shibin's motion to suppress these confessions. *Shibin*, 2012 WL 195012, at *3-5 (alterations added).

UNCLOS article 101(c) requires that an individual facilitate piracy while on the high seas, or whether the law of nations definition of piracy extends to acts of facilitation that occur outside the "high seas," in a state's territorial waters, or even on dry land. Turning to cases before the US Court of Appeals that deal with pirate negotiators, the answer to this question seems settled for the time being. The United States can prosecute pirate negotiators, under a theory of universal jurisdiction—even if they never act on the high seas—so long as their acts facilitated acts of piracy that did occur on the high seas.[207] One question remains, however: can the United States now prosecute all piracy facilitators—investors, kingpins, and those who offer political support? More to the point—*should* the United States prosecute these individuals?

A. Current US Attempts to Prosecute Pirate Negotiators: The Factual Background and Procedural Posture of the Shibin and Ali Cases

1. United States v. Shibin

a. The Factual Basis for the Prosecution of Mohammad Shibin

The United States prosecuted Mohammad Saaili Shibin for his involvement in two separate pirate attacks.[208] The first incident occurred in May of 2010, when several Somali nationals—not including Shibin himself—attacked and seized the M/V *Marida Marguerite*, a German-owed vessel with a crew of nineteen Indians, two Bangladeshis, and one Ukrainian.[209] After the initial attack, the *Marguerite* and its crew of twenty-two were led to an area just off the coast of Somalia and held captive from May to December 2010.[210] During this time, Shibin allegedly came to the *Marguerite* and proceeded to negotiate a ransom with the ship's owners.[211] Shibin successfully negotiated a ransom with the owners of the *Marida Marguerite*, and received approximately $30,000 to $50,000 in US currency for his services.[212]

The second event occurred on February 19, 2011, when several armed Somali nationals, not including Shibin himself, boarded the S/V *Quest*, a

---

207. *See generally Ali*, 885 F. Supp. 2d at 21, *opinion vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013), and *aff'd in part*, 718 F.3d 929 (D.C. Cir. 2013); United States v. Shibin, 722 F.3d 233 (4th Cir. 2013).

208. *Shibin*, 2012 WL 195012, at *1-2; *see also* Press Release, Fed. Bureau of Investigation, Somali Hostage Negotiator in S/V Quest and M/V Miranda Marguerite Piracies Sentenced to Multiple Life Sentences (Aug. 13, 2012), *archived at* http://perma.cc/WD79-BNQE.

209. *Shibin*, 2012 WL 195012, at *1.

210. Press Release, Fed. Bureau of Investigation, *supra* note 208.

211. *Shibin*, 2012 WL 195012, at *1.

212. *Id.*; *see also* Press Release, Fed. Bureau of Investigation, *supra* note 208.

US-flagged vessel, took the four US citizens on board as hostages, and then headed toward Somalia.[213] United States military personnel aboard the USS *Sterett*, a US vessel "located off the coast of Somalia, attempted to secure the release of the hostages through negotiations with several of the hostage-takers."[214] On February 20, 2011, one of the conspirators aboard the *Quest* purportedly identified Shibin "as the person responsible for negotiating the return of the hostages upon the vessel's arrival in Somalia."[215] "On February 22, 2011, one of the individuals on board the *Quest* fired a rocket-propelled grenade at the USS *Sterett*;" then, before Navy Seals could board the vessel, the four hostages were shot and killed.[216] On April 4, 2011, Shibin was taken into custody by foreign forces in Somalia; he was questioned by FBI agents and eventually transported to the United States.[217]

b. Procedural History: Indictment, Piracy Counts, and Sentencing of Mohammad Shibin

In a superseding indictment, dated August 17, 2011, Mohammad Shibin was indicted on fifteen counts for his role in the seizure of the *Marida Marguerite* and the *Quest*; the indictment included piracy under the law of nations in counts one and seven.[218] On November 1, 2011, Shibin filed a motion to dismiss count one of the superseding indictment.[219] Count one alleged that from in and around May 2010, to in and around January 2011, Shibin committed the crime of piracy as defined under the law of nations in violation of 18 U.S.C. §§ 1651 and 2.[220] Shibin alleged that, under the government's proposed facts, he was only contacted after the *Marguerite* was seized, and therefore, only actively participated after the substantive offense of piracy had been completed.[221] In other words, Shibin alleged that because he was never personally present on the high seas he was not subject to liability under 18 U.S.C. §§ 1651 and 2.[222]

Turning to the law of nations definition of piracy at the time of the offense, the government argued that both the 1958 High Seas Convention and the 1982 UNCLOS provide the law of nations definition of piracy; furthermore, both treaties define piracy to include the conduct charged in

213. *Shibin*, 2012 WL 195012, at *1.
214. *Id.*
215. *Id.*
216. *Id.*; *see also* Press Release, Fed. Bureau of Investigation, *supra* note 208.
217. *Shibin*, 2012 WL 195012, at *2.
218. United States v. Shibin, No. 2:11CR00033, 2011 WL 3621858 (E.D. Va. Aug. 17, 2011).
219. United States v. Shibin, No. 2:11CR33, 2011 WL 9522735 (E.D. Va. Nov. 1, 2011).
220. *Shibin*, 2011 WL 3621858.
221. *Shibin*, 2011 WL 9522735.
222. *Id.*

Shibin's case.[223] In particular, the government alleged that under section (3) of the High Seas Convention, and UNCLOS article 101(c), Shibin facilitated acts of violence and detention when he provided negotiation services.[224] In essence, the government alleged that Shibin was a link in the "causal chain" between the physical acts of piracy and the ultimate ransom delivery.[225] More important, for the purposes of this Note, the government argued that the facilitation prong of the piracy definition contained in the High Seas Convention could be satisfied by acts occurring within a State's territorial jurisdiction.[226]

Judge Robert Doumar allowed Shibin's case to proceed on all counts, and even ruled against Shibin on motion to suppress statements made while in custody.[227] In April of 2012, a jury convicted Shibin of all fifteen counts contained in the superseding indictment.[228] Subsequently, he was sentenced to ten concurrent and two consecutive life sentences.[229] On December 13, 2012, Shibin filed an appellate brief with the Fourth Circuit Court of Appeals challenging the District Court's ruling on several pre-trial motions.[230] In upholding Shibin's conviction, the Fourth Circuit held that "conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas."[231]

2. United States v. Ali

a. The Factual Background for the Prosecution of Ali Mohamed Ali

The second case concerns charges filed against Ali Mohamed Ali.[232] The charges stem from the hijacking of the M/V *CEC Future*, a Bahamian-flagged cargo ship, owned by Clipper Group A/S, a Danish company.[233] On November 7, 2008, the *CEC Future* was seized by Somali pirates as it was sailing in the Gulf of Aden, off the coast of Yemen.[234] The pirates forced

223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Shibin*, 2012 WL 195012, at *7.
228. Press Release, United States Attorney's Office E. Dist. of Va., Somali Hostage Negotiator In S/V Quest Piracy And Pirating Of M/V Marida Marguerite Found Guilty Of All Counts (Apr. 27, 2012) *archived at* http://perma.cc/U2M7-QWU6.
229. Press Release, Fed. Bureau of Investigation, *supra* note 208.
230. Shibin Brief, *supra* note 43, at 10-11.
231. United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).
232. United States v. Ali, 870 F. Supp. 2d 10, 15 (D.D.C. 2012).
233. *Id*.
234. *Id.*

the ship to Point Raas Binna, near the Somali coast.[235] On or about November 9 or 10, Ali boarded the ship before it sailed to waters near Eyl, Somalia, and allegedly communicated ransom demands from the pirates to Clipper Group.[236] "Initially, Ali communicated with 'Steven,' a negotiator hired by Clipper [Group], but as the incident wore on, Ali began communicating directly with Per Gullestrup, Clipper's CEO."[237]

The government further alleges that Ali negotiated a ransom of $1.7 million for the release of the ship, and that he also negotiated a separate payment of $75,000 for himself.[238] "On January 16, 2009, after Clipper Group paid the $1.7 million, Ali and the pirates disembarked the ship. Ali allegedly received the $75,000 from Clipper on or about January 27, 2009."[239]

In June of 2010, Ali was appointed the Director General of the Ministry of Education in Somaliland, a self-declared republic within Somalia.[240] Then, in March of 2011, Ali received an email from a US foundation inviting him to attend a conference on education in Raleigh, North Carolina.[241] Ali traveled to the United States and was arrested when he arrived at Dulles International Airport on April 20, 2011.[242]

b. Procedural History: Indictment, Piracy Charges, and Current Status of the Case Against Ali Mohamed Ali

An indictment returned on April 15, and unsealed on April 21, 2011 charged Ali with

> conspiracy to commit piracy under 18 U.S.C. §§ 1651, 371 (Count One); piracy and aiding and abetting under 18 U.S.C. §§ 1651, 2 (Count Two); conspiracy to commit hostage taking under 18 U.S.C. § 1203 (Count Three); and hostage taking and aiding and abetting under 18 U.S.C. §§ 1203, 2 (Count Four).[243]

On May 29, 2012, Ali filed a motion to dismiss counts one through four of the indictment.[244] In a memorandum opinion issued on July 13,

235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 17.
241. *Id.*
242. *Id.*
243. *Id.* at 21.
244. United States v. Ali, No. 11-106, 2012 WL 3792706 (D.D.C. May 29, 2012).

2012, District Court Judge Ellen Huvelle granted in part and denied in part Ali's motion.[245] The court dismissed count one, conspiracy to commit piracy, for failure to state an offense because conspiracy was not in the UNCLOS definition.[246] The court allowed count two, aiding and abetting, to proceed because it found that 18 U.S.C. §§ 1651 and 2 were the functional equivalent of UNCLOS article 101(c).[247] However, the Court narrowed the piracy and aiding and abetting offense of count two, concluding: "[i]t will be the government's burden to convince the jury beyond a reasonable doubt that Ali intentionally facilitated acts of piracy while he was on the high seas."[248] It denied Ali's motion in all other respects.[249]

At the outset of the case it seemed a foregone conclusion that the government would be able to show that Ali facilitated piracy while on the high seas. Initially, on June 11, 2012, the government stated: "the evidence will show that [Ali] was acting as a negotiator for the pirates while the *CEC Future* was on the high seas."[250] However, at a status hearing conducted July 20, 2012, the government had revised its position, contending instead that "Ali boarded the *CEC Future* on November 9, 2008, in territorial waters, and that the *CEC Future* then sailed through international waters for a matter of 'minutes'. . . before stopping in Somali waters near Eyl, where it remained for the duration of the incident."[251] In light of the government's change in position, District Court Judge Ellen Huevelle stated that she was misled by a government claim that Ali was in international waters.[252] In fact, Judge Huevelle went further to call the prosecution's dramatic change in position "unbelievably inexcusable behavior."[253]

In a memorandum opinion issued after the status hearing on July 20, Judge Huevelle vacated Section II(D) of the July 13 opinion and dismissed courts three and four.[254] Moreover, she released Ali Mohamed Ali from prison and allowed him to be confined at a friend's home in Centerville, Virginia, while the government appealed several of the pretrial rulings.[255]

---

245. *Ali*, 885 F. Supp. 2d at 45.
246. *Id.* at 35; *see also* FED. R. CRIM. P. 12(b)(3)(B).
247. *Ali,* 885 F. Supp. 2d at 32.
248. *Id.*
249. *Id.* at 45-46.
250. *Id.* at 57.
251. *Id.*
252. *Ali*, 885 F. Supp. 2d at 57-58; *see also* Martha Neil, *Federal Judge Blasts US Prosecutors for 'Unbelievably Inexcusable Behavior' in Somali Piracy Case*, ABA JOURNAL (July 23, 2012, 5:11 PM), http://www.abajournal.com/news/article/federal_judge_blasts_prosecution_in_somali_piracy_case_for_unbelievably_ine/, *archived at* http://perma.cc/LL88-KCY8.
253. Neil, *supra* note 252.
254. *Ali*, 885 F. Supp. 2d at 62.
255. Frederic J. Frommer, *Alleged Somali Pirate Ordered Back Into Custody*, ASSOCIATED PRESS (Aug. 3, 2012, 9:06 PM), http://bigstory.ap.org/article/alleged-somali-

The government filed an emergency motion with the US Court of Appeals for the District of Columbia Circuit seeking an immediate stay of the district court's release order, and an order returning Ali to custody pending an appeal of the District Court's release order.[256] The D.C. Circuit Court of Appeals granted the government's motion, and, without issuing an opinion, instructed Judge Huvelle to return Ali to custody pending trial.[257] Judge Huvelle issued the order and Ali was returned to custody by the Department of Corrections.[258]

Most recently, the Court of Appeals for the District of Columbia Circuit ruled on an appeal by the US Government regarding Judge Huvelle's decision to dismiss, in part, charges of aiding and abetting piracy. It held that the prosecution of someone for the crime of aiding and abetting piracy, based on acts not committed on the high seas, was consistent with the law of nations.[259]

B. The Text of UNCLOS, the Legislative History of 18 U.S.C. §§ 1651 and 2, and Consideration of International Law: A Comparative Analysis of the Arguments Presented in U.S. v. Shibin and U.S. v. Ali

Those wishing to impose a "high seas" requirement (supporters of the high seas requirement), including Mohammad Shibin,[260] have made several arguments suggesting that the government should be required to prove beyond a reasonable doubt that an individual facilitated piracy while on the high seas to procure a conviction under 18 U.S.C. §§ 1651 and 2. On the other hand, those who oppose requiring the government to satisfy a "high seas" requirement (opponents of the high seas requirement), such as the US Government, suggest that 18 U.S.C. §§ 1651 and 2 can apply to conduct that occurs beyond the high seas because UNCLOS article 101(c) does not explicitly mention the "high seas." Both sides of the debate have supported their respective positions with a combination of arguments focusing on the text of UNCLOS article 101, legislative history, and general principles of international law.[261] Ultimately, at the US appellate level, the law has been settled with respect to pirate negotiators: the US Government does not need to prove that negotiators facilitated piracy *while on the high seas*, even when universal jurisdiction is the theory used to prosecute the negotiator.

---

pirate-ordered-back-custody, *archived at* http://perma.cc/3CW8-DS3T.

256. Emergency Motion for Order Staying District Court's Order of Release and for Issuance of Writ to Return Defendant to Custody of United States Marshals Service or, in the Alternative, for Expedited Briefing of the Government's Appeal of the District Court's Order of Release at 1, *Ali*, 885 F. Supp. 2d 55 (No. 12-3056), *archived at* http://perma.cc/Q62Q-ZXMK.

257. Frommer, *supra* note 255.

258. Frommer, *supra* note 255.

259. United States v. Ali, 718 F.3d 929, 936 (D.C. Cir. 2013).

260. *See* Shibin Brief, *supra* note 43, at 12.

261. *See Ali*, 885 F. Supp. 2d at 30; *see also id.* at 24-28.

1. The Text of UNCLOS Article 101

The strongest argument for opponents of the "high seas" requirement focuses on a plain language comparison between the text of UNCLOS article 101(a) and the text of article 101(c).[262] Article 101(a) designates as piracy "illegal acts of violence or detention . . . committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed: (i) on the high seas . . . ."[263] On the other hand, UNCLOS article 101(c) defines piracy as "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."[264] Article 101(a) specifically includes "high seas" language, but article 101(c) excludes such "high seas" language.[265] Opponents of a high seas requirement argue that if a high seas requirement were imputed to article 101(c), then the "high seas" language contained in the first definition of piracy would be rendered ineffectual.[266] Because statutory construction mandates an interpretation that ensures that statutory language is not rendered meaningless, then the lack of a high seas requirement in article 101(c) must be interpreted as an intentional omission.[267]

Absence of "high seas" language in article 101(c) is strong evidence that acts of pirate facilitation can occur outside of the high seas. As the Court of Appeals for the District of Columbia Circuit put it, "[e]xplicit geographical limits—'on the high seas' and 'outside the jurisdiction of any state'—govern piratical acts under article 101(a)(i) and (ii). Such language is absent, however, in article 101(c), strongly suggesting a facilitative act need not occur on the high seas so long as its predicate offense has."[268] Likewise, the Fourth Circuit Court of Appeals interpreted article 101(a) and article 101(c) as creating separate offenses:

---

262. *See* GEISS & PETRIG, *supra* note 91, at 64-65; Government's Response to Defendant's Motion to Dismiss All Charges for Lack of Jurisdiction, United States v. Shibin, No. 2:11CR33, 2011 WL 9522720 (E.D. Va. Nov. 15, 2011) [hereinafter Government's Response, Shibin]; Douglas Guilfoyle, *Committing Piracy on Dry Land: Liability for Facilitating Piracy*, EJIL: TALK! (July 26, 2012), http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/, *archived at* http://perma.cc/PF8J-B9QB; Roger L. Phillips, *Intentional Facilitation and Commission of Piracy as Part of a Joint Criminal Enterprise*, COMMUNIS HOSTIS OMNIUM (July 26, 2012), http://piracy-law.com/2012/07/26/intentional-facilitation-and-commission-of-piracy-as-part-of-a-joint-criminal-enterprise/, *archived at* http://perma.cc/A3JC-ZRSX; Bellish, *supra* note 54.

263. UNCLOS, *supra* note 58, art. 101(a).

264. UNCLOS, *supra* note 58, art. 101(c).

265. UNCLOS, *supra* note 58, art. 101.

266. *See* Government's Response, Shibin, *supra* note 262; Guilfoyle, *supra* note 262; Phillips, *supra* note 262; Bellish, *supra* note 54.

267. *See* Government's Response, Shibin, *supra* note 262; Guilfoyle, *supra* note 262; Phillips, *supra* note 262; Bellish, *supra* note 54.

268. United States v. Ali, 718 F.3d 929, 937 (D.C. Cir. 2013).

> The text of Article 101 describes one class of acts involving violence, detention, and depredation of ships on the high seas and another class of acts that facilitate those acts. In this way, Article 101 reaches all the piratical conduct, wherever carried out, so long as the acts specified in Article 101(a) are carried out on the high seas.[269]

Scholars who argue that article 101(c) does implicitly contain a high seas requirement counter with a textual argument considering the text of UNCLOS in its entirety.[270] For example, article 86 provides that the provisions contained in Part VII on the High Seas—the part that contains the article 101 definition of piracy—"apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."[271] Article 86 further provides: "[t]his article does not entail any abridgment of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."[272] Both the Court of Appeals for the District of Columbia and the Fourth Circuit rejected this argument largely because reading a high seas requirement into article 101(c) would result in numerous redundancies throughout UNCLOS.[273] A better reading of article 86, according to the US appellate courts, interprets the article in an introductory, or definitional role, for the portions of UNCLOS dealing with issues pertaining to the high seas.[274]

Likewise, article 100 provides a duty to cooperate in the repression of piracy, but includes an explicit high seas requirement: "states shall cooperate to the fullest possible extent in the repression of piracy on the high seas . . . ."[275] Article 105 makes a similar reference to the "high seas." It provides: "[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . taken by piracy and under the control of pirates, and arrest the persons and seize the property on board."[276] Based on the explicit high seas requirement found in articles 86, 100, and 105, supporters argue that a high seas requirement should be imputed to UNCLOS article 101(c) as a prerequisite for any exercise of universal jurisdiction.[277] The Court of Appeals for the District of Columbia

269. United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).
270. *See* Bellish, *supra* note 54.
271. UNCLOS, *supra* note 58, art. 86.
272. UNCLOS, *supra* note 58, art. 86.
273. *Ali*, 718 F.3d at 937; *Shibin*, 722 F.3d at 241.
274. *Ali*, 718 F.3d at 938; *Shibin*, 722 F.3d at 241.
275. UNCLOS, *supra* note 58, art. 100.
276. UNCLOS, *supra* note 58, art. 105.
277. Government's Response, Shibin, *supra* note 262; *see also* Bellish, *supra* note 54 (discussing the views of proponents of the high seas requirement).

again rejected this argument, reasoning that article 105's reference to the "high seas highlights the broad authority of nations to apprehend pirates even in international waters."[278]

Considering the text of UNCLOS article 101(c), in juxtaposition to the text of article 101(a), it appears as though no high seas requirement exists for those individuals who merely "incite" or "intentional[ly] facilitate" acts of piracy.[279] Indeed, a plain language reading of the text of UNCLOS article 101 was dispositive for the Fourth Circuit, and the D.C. Circuit Courts of Appeals.[280]

2. Legislative History: 18 U.S.C. § 2 and the Charming Betsy Cannon

Supporters of the high seas requirement argue that Congress did not intend for § 2 to apply to acts of general piracy. Indeed, the district court in *U.S. v. Ali* analyzed the legislative history behind 18 U.S.C. § 2 to suggest that Congress did not intend for § 2 to broaden the scope of 18 U.S.C. § 1651 to include facilitation in foreign territorial waters.[281] This line of argument supports the position held by those wishing to impose a high seas requirement because it favors a narrower reading of 18 U.S.C. §§ 1651 and 2.

Supporters of the high seas requirement reason that both 18 U.S.C. § 1651 and 18 U.S.C. § 2 have their origin in the Crimes Act of 1790; § 1651 originates from section 8 and § 2 originates from section 10 of that Act respectively.[282] In 1818, the Supreme Court in *United States v. Palmer* reasoned that the piracy provisions contained in the Crimes Act of 1790 did not include the acts of foreigners aboard foreign vessels traversing the high seas.[283] In particular, the Court analyzed section 10 which, by its language, purported to apply to "any person":

> It will scarcely be denied that the words "any person," when applied to aiding or advising a fact, are as extensive as the same words when applied to the commission of that fact. Can it be believed that the legislature intended to punish with death the subject of a foreign prince, who, within the dominions of that prince, should advise a person,

278. *Ali*, 718 F.3d at 938.

279. GEISS & PETRIG, *supra* note 91, at 64-65.

280. *See Ali*, 718 F.3d at 937; United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013).

281. United States v. Ali, 885 F. Supp. 2d 17, 21 (D.D.C. 2012), *opinion vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013), and *aff'd in part*, 718 F.3d 929 (D.C. Cir. 2013).

282. *Id.*

283. *Id.*; Shibin Brief, *supra* note 43, at 21 (citing United States v. Palmer, 16 U.S. 610, 633-34 (1818)).

> about to sail in the ship of his sovereign, to commit murder or robbery?[284]

Subsequently, Congress passed the Act of March 3, 1819, which criminalized not only piratical acts with a nexus to the United States, but also piracy as an international offense subject to universal jurisdiction.[285] Supporters of the high seas requirement note that while Congress revised section 8 to include general piracy, Congress did not revise section 10; therefore, Congress did not revise the *Palmer* Court's holding that section 10 applied as a municipal statute.[286] Because Congress had the opportunity to revise section 10—which is § 2's predecessor—in the Act of 1819, but chose not to, it stands to reason that Congress does not intend for the modern § 2 to apply to general piracy.[287]

The *Charming Betsy* cannon presumes that Congress does not intend to violate international law, so that an ambiguous statute must be construed so that it does not violate the "law of nations."[288] When universal jurisdiction is the basis for a court's jurisdiction over a particular matter, the court must determine whether the charged conduct falls within the international law definition of a universal jurisdiction crime; otherwise it would violate international law, and consequently the *Charming Betsy* cannon as well.[289] As discussed *supra* in Part III, UNCLOS article 101 provides the international law definition of piracy.[290] UNCLOS provides that 'any act of inciting or of intentionally facilitating" an act of piracy is *itself* piracy' as defined by UNCLOS Article 101(c)."[291] Furthermore, "[u]nder domestic law, 18 U.S.C. § 2 makes those who aid, abet, counsel, command, induce, procure, or willfully cause the commission of a federal crime punishable as a principle."[292] The court in *Ali* reasoned that the aiding and abetting charge in count two was functionally equivalent to the definition contained in UNCLOS article 101(c); therefore, it permitted the charge to proceed.[293] However, because of the *Charming Betsy* cannon, the *Ali* court reasoned that the government must prove "that Ali intentionally facilitated acts of piracy while he was on the high seas."[294]

---

284. *Ali*, 885 F. Supp. 2d at 31 (citing *Palmer*, 16 U.S. at 633).
285. *Id.*; *see* Act of 1819, ch. 77, § 5, 3 Stat. 513–14.
286. *Ali*, 885 F. Supp. 2d at 31; Shibin Brief, *supra* note 43, at 21.
287. *Ali*, 885 F. Supp. 2d 17; Shibin Brief, *supra* note 43, at 21.
288. *Ali*, 885 F. Supp. 2d at 32 (citing George E. Warren Corp. v. EPA, 159 F.3d 616, 624 (D.C. Cir. 1998) (some internal quotation marks omitted) (quoting S. African Airways v. Dole, 817 F.2d 119, 125 (D.C. Cir. 1987))).
289. *Id.* at 29.
290. *Id.*; *see supra* Part III.
291. *Ali*, 885 F. Supp. 2d at 30.
292. *Id.* (citing 18 U.S.C. §§ 2(a), 2(b)).
293. *Id.* at 30.
294. *Id*. at 29.

On the other hand, opponents of the high seas requirement, including the federal prosecutors in *United States v. Shibin* and the US Court of Appeals for the District of Columbia, reason that 18 U.S.C. §§ 1651 and 2 apply extraterritorially by virtue of their plain meaning.[295] Opponents of the "high seas" requirement argue that Congress intended 18 U.S.C. § 1651 to apply extraterritorially because it defined piracy by reference to the "law of nations" which can evolve over time.[296] The government has argued that, where Congress has expressed a clear intent for a criminal statue to apply extraterritorially, it is unnecessary for the courts to consider customary international law because Congress has the power to create legislation that violates international law.[297] The government in *Shibin* argued that the acts of those pirates who physically act on the high seas are clearly prohibited by 18 U.S.C. § 1651, through reference to UNCLOS article 101, while those who participate in the act of piracy are equally culpable under 18 U.S.C. § 2 by reference to UNCLOS article 101(c).[298] Opponents of the high seas requirement argue that US domestic jurisdiction is consistent with the universal jurisdiction under customary international law, and international law prohibits acts of facilitation.[299] The D.C. Circuit Court of Appeals found this argument persuasive: "[b]ecause international law permits prosecuting acts of aiding and abetting piracy committed while not on the high seas, the *Charming Betsy* canon is no constraint on the scope of Count Two."[300]

3. The Competing Interest of International Law: Expediency vs. The Requirements of Customary International Law Under UNCLOS article 101

Another argument articulated by opponents of the high seas requirement centers on the practical benefits of prosecuting those who facilitate acts of piracy from Somali territorial waters. The necessity of stopping the scourge of piracy, the argument suggests, should weigh strongly in favor of not imposing a high seas requirement.[301] In the *Shibin* case, for example, the US Government relied on practical arguments to come to the conclusion that UNCLOS should not include a "high seas" requirement:

---

295. United States v. Shibin, No. 2:11CR33, 2012 WL 8231152, at *5 (E.D. Va. Apr. 16, 2012), *aff'd*, 722 F.3d 233 (4th Cir. 2013) (citing United States v. Yousef, 327 F.3d 56, 91-96 (2d Cir. 2003)); United States v. Ali, 718 F.3d 929, 936 (D.C. Cir. 2013).

296. *Shibin*, 2012 WL 8231152, at *5.

297. *Id.*

298. *Id.*

299. *Id*.

300. United States v. Ali, 718 F.3d 929, 939 (D.C. Cir. 2013).

301. Government's Response, Shibin, *supra* note 262.

> This conclusion not only flows from the plain reading of UNCLOS, but also makes sense in practice. Any other rule would allow the persons who finance piracy in Somalia and the persons who negotiate for the pirates to act with impunity, orchestrating and enabling international crime without fear of facing justice in the courts of the nations whose citizens and ships they prey upon.[302]

Prosecuting negotiators and financiers may be one of the most promising ways of stopping global piracy.[303] This argument has gained international attention: the United National Security Council has recognized the "need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks."[304] Opponents of the high seas requirement have argued that public necessity favors prosecuting those who act from within territorial waters.

On the other hand, supporters of the high seas requirement have argued that an interpretation of UNCLOS article 101(c), which permits the US government to prosecute individuals for conduct occurring within a state's territorial jurisdiction, itself violates the traditional understanding of piracy law.[305] Supporters of the high seas requirement have argued that the history behind the piracy provisions of UNCLOS indicates that UNCLOS article 101(c) does not reach into the territory of a sovereign state—even when the crime is one of facilitation.[306] The language of UNCLOS comes from the 1958 High Seas Convention and the 1932 Harvard Research in International Law Draft Convention on Piracy.[307] Article 3(3) of the Harvard Draft Convention on Piracy defines as piracy "[a]ny act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article."[308]

The comments to article 3 elaborate on this definition, providing an indication of the drafter's intent.[309] In particular, the note to article 3 ties acts of facilitation to the "high seas."[310] Note 3 provides:

---

302. Government's Response, Shibin, *supra* note 262.

303. Jon Bellish, *Will the United States Play a Role in Prosecuting Pirate "Kingpins?"*, COMMUNIS HOSTIS OMNIUM (Apr. 21, 2012), http://piracy-law.com/2012/04/21/will-the-united-states-play-a-role-in-prosecuting-pirate-kingpins/, *archived at* http://perma.cc/3H8X-EFKN.

304. S.C. Res. 2020, *supra* note 36.

305. *Ali*, 885 F. Supp. 2d at 32; *see also* Shibin Brief, *supra* note 43, at 16.

306. Shibin Brief, *supra* note 43, at 16-18.

307. Shibin Brief, *supra* note 43, at 17-18.

308. *Harvard Research*, *supra* note 163, at 149; *see also id.* at 17-18.

309. Shibin Brief, *supra* note 43, at 18; Bellish, *supra* note 160.

310. *Harvard Research*, *supra* note 163, at 149.

> By this clause, instigations and facilitations of piratical acts, previously described in the Article are included in the definition of piracy. Obviously, convenience is served by this drafting device. The act of instigation or facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction.[311]

Commentators who support a "high seas" requirement have latched on to the language in note 3 to argue that the Harvard Draft Convention contemplated a high seas requirement for acts of facilitation and instigation.[312]

The text of UNCLOS article 101(c) can be traced back to the language of the Harvard Draft Convention; therefore, the Harvard Draft Convention provides a strong indication of how UNCLOS article 101(c) should be interpreted.[313] The 1956 Draft Articles on the Law of Sea, which formed the basis for the High Seas Convention, endorsed the 1932 Harvard Draft Convention on Piracy.[314] Finally, UNCLOS adopted virtually the same definition of piracy as was contained in the High Seas Convention.[315] Therefore, because the language of UNCLOS article 101 can be traced back to the 1932 Harvard Draft Convention on Piracy, and because that Convention specified a high seas requirement for facilitation, then it stands to reason that UNCLOS article 101(c) also contains a high seas requirement for facilitation.

This argument has found little favor at the federal appellate level in the United States, when the D.C. Court of Appeals considered relying on the Harvard Draft Convention "a bridge too far."[316] The D.C. Circuit reasoned that deducing a single intent from the legislative history of UNCLOS would prove difficult.[317] Moreover, it reasoned that basic principles of statutory interpretation allow courts to consider extraneous materials only when the plain language of the treaty is unclear.[318] Based on the foregoing discussion, the D.C. Circuit found the plain language of

---

311. *Harvard Research*, *supra* note 163, at 149; *see also* Shibin Brief, *supra* note 43, at 18.

312. Shibin Brief, *supra* note 43, at 18; Bellish, *supra* note 160.

313. Bellish, *supra* note 160.

314. "In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research." Bellish, *supra* note 160; *see also* 1956 Y.B. OF THE ILC, Vol. II, at 282.

315. *Compare* High Seas Convention, *supra* note 170, art. 15, *with* UNCLOS, *supra* note 58, art. 101.

316. United States v. Ali, 718 F.3d 929, 939 (D.C. Cir. 2013).

317. *Id*.

318. *Id*.

UNCLOS article 101 to be dispositive; it did not consider the legislative intent behind article 101 in its analysis.[319]

V. RECOMMENDATIONS

Given the background information regarding the history of piracy in the United States and under the "law of nations"—considering also recent US attempts to prosecute pirate negotiators—a normative question arises: what role, if any, *should* the United States play in prosecuting individuals who negotiate and facilitate acts of piracy from within Somali territorial jurisdiction, and on the Somali mainland? This question at once gives rise to at least three potential responses.

First, the United States could take an aggressive, pro-prosecution stance by indicting and prosecuting white-collar, high-ranking pirates and those who facilitate acts of piracy. Based on the holdings in *United States v. Shibin* and *United States v. Ali*, it seems clear that the United States has strong legal ground to stand on for prosecuting pirate negotiators.[320] However, the United States could interpret *Shibin* and *Ali* as also providing the legal basis for prosecuting all those individuals who "incit[e] or intentionally facilitate[e]"[321] acts of piracy, regardless of their geographic location. In other words, federal prosecutors could begin prosecuting high-ranking Somali pirates: the kingpins, investors, and individuals who provide political capital to piracy operations.[322] This pro-prosecution position follows from the broadest reading of *United States v. Shibin* and *United States v. Ali*.

Second, federal prosecutors could read the holdings in *Shibin* and *Ali* in a narrow manner as establishing the legal basis for prosecuting pirate negotiators, but not establishing the basis for prosecuting all those individuals associated with acts of piracy committed on the high seas. Under this view, the United States would begin prosecuting pirate negotiators—assuming personal jurisdiction can be achieved—but would not attempt to prosecute the investors, kingpins, and political elite whose acts not only make piracy possible, but profitable too.

---

319. *Id*.

320. *See id.* at 937 (holding that the prosecution of defendant, Ali, for aiding and abetting piracy based on acts not committed on the high seas was consistent with the law of nations); United States v. Shibin, 722 F.3d 233, 241 (4th Cir. 2013) (holding that the defendant, Shibin, could be prosecuted as an aider and abettor of piracies of German and American vessels, which took place on the high seas).

321. UNCLOS, *supra* note 58, art. 101(c).

322. Under 18 U.S.C. §§ 1651 and 2(a), "[a]ll that is necessary is to show some affirmative participation which at least encourages the principal offender to commit the offense, with all its elements, as proscribed by the statute." *Ali*, 718 F.3d at 936 (quoting United States v. Raper, 676 F.2d 841, 850 (D.C. Cir. 1982)) (alteration added).

Third, and the position taken by this Note, federal prosecutors in the United States could interpret the holdings of *Shibin* and *Ali* as establishing the legal basis for prosecuting pirate negotiators consistent with principles of international law and universal jurisdiction, but treat the cases as anomalies. The cases are anomalous insofar as they allow the United States to prosecute individuals whose acts only indirectly affected the United States and who may have never entered the high seas. Under this view, federal prosecutors would recognize their legal authority to prosecute negotiators, instigators, and kingpins, but choose not to exercise the full range of their authority. Instead, US authorities would exercise prosecutorial discretion by electing to prosecute only individuals acting on the high seas while deferring the prosecution of high-ranking pirates to the larger international community.

On a whole, the holdings in *Ali* and *Shibin* at the federal appellate level serve as victories for federal prosecutors. However, this Note interprets those cases as anomalies. When the only basis for jurisdiction is universality, federal prosecutors should only prosecute an individual who facilitates acts of piracy if that individual acts while on the high seas.[323] First, this policy would adhere more closely to the policy rationales underlying universal jurisdiction. Second, it would foster respect for Somali territorial jurisdiction by deferring to the larger international community to prosecute the high-ranking pirates.

A. The Rationale Behind the Exercise of Universal Jurisdiction

The rationale underlying the theory of universal jurisdiction favors imposing discretionary limitations on prosecutions conducted pursuant to 18 U.S.C. §§ 1651 and 2. Opponents of the high seas requirement have argued that, because pirate negotiators facilitate indiscriminate acts of piracy that occur on the high seas, and because the pirates acting on the high seas do not discriminate against their victim's nationality, then all states have an interest in prosecuting both the pirates committing the acts of violence, and the negotiators involved.[324] This argument, however, is at odds with one of the most longstanding principles behind the crime of piracy—that the crime of piracy, as an international crime, is subject to the jurisdiction of all states.[325]

---

323. To be sure, the situation would be much different if the United States had a direct interest in the prosecution. If the captive ship were a US-flagged vessel, for example, then the United States would have a greater incentive to prosecute all those who facilitated the act of piracy. However, when the basis for jurisdiction is universality, then the connection becomes more tenuous, and the United States has less of an incentive to prosecute individuals acting from locations other than the high seas.

324. *See generally* Government's Response, Shibin, *supra* note 262.

325. *See* Dickinson, *supra* note 81, at 335.

When piracy occurs on the high seas every state has an interest in seeing the perpetrator prosecuted, but no individual state has territorial jurisdiction.[326] When a pirate boss finances a piracy operation while in the territorial jurisdiction of Somalia, the United States—with no jurisdictional nexus to the act of piracy—would be violating this rationale by prosecuting him on a theory of universal jurisdiction. One who acts from within the territorial jurisdiction of a state is, by definition, still subject to the territorial jurisdiction of the state within which the act occurred.[327] To be sure, multiple states may assert competing claims to jurisdiction over a single criminal act.[328] Even though Somalia may lack the resources or political will to prosecute pirates acting from within its territorial waters, it still has jurisdiction over these criminal acts.[329] To be clear, the flag state[330] of the victim ship, the state to which the crew members belong, or the state of Somalia itself, may have jurisdiction over acts occurring in Somali territorial waters. In fact, UNCLOS article 100 contemplates a duty for all states to cooperate in the repression of piracy.[331] Consequently, if Somalia has territorial jurisdiction over acts that occur within its territorial waters and the only basis for US jurisdiction is a theory of universal jurisdiction—without any closer jurisdictional nexus—then a US prosecution would impinge the territorial sovereignty of Somalia.[332]

Second, one might argue that the exercise of universal jurisdiction over higher-ups in the piracy hierarchy can be rationalized under a "de-nationalization" theory, or the notion that when an individual commits an act of piracy he or she relinquishes his or her nationality.[333] The "de-nationalization" theory, however, also fails to explain how universal jurisdiction can extend into Somali territorial waters. The "de-nationalization" theory is premised on the notion that an act of piracy obviates an individual's nationality, and therefore, removes the ability of a state to prosecute that individual under a national basis of jurisdiction.[334] Turning to *U.S. v. Ali* as an example, the "de-nationalization" theory makes

---

326. GEISS & PETRIG, *supra* note 91, at 151; Kontorovich, *supra* note 88, at 252.

327. See *supra* Part II (A)(1)-(2) for a discussion of the definition of territorial jurisdiction.

328. Kontorovich, *supra* note 78, at 188.

329. S.C. Res. 2020, *supra* note 36, ¶ 6 ("*[r]eaffirming* its respect for the sovereignty, territorial integrity, political independence and unity of Somalia") (alteration added).

330. *See* UNCLOS, *supra* note 58, art. 91 (establishing that "ships have the nationality of the State whose flag they are entitled to fly").

331. UNCLOS, *supra* note 58, art. 100 ("All States shall cooperate 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.").

332. *See supra* Part II (A)(1)-(2) for a discussion of the definition of universal jurisdiction.

333. GEISS & PETRIG, *supra* note 91, at 146.

334. GEISS & PETRIG, *supra* note 91, at 146.

little sense as a basis for universal jurisdiction. More than a year after Ali negotiated a ransom from the Clipper Group, he was appointed General of the Ministry of Education in Somaliland.[335] In light of Ali's position of prominence in Somaliland in June of 2010, it seems improbable to suggest that he somehow ceased to be a citizen of Somalia after he negotiated a ransom in January of 2009. In fact, piracy is such a ubiquitous profession in Somalia that it is hard to image that any Somali pirate loses citizenship merely by participating in acts of piracy.[336] The "de-nationalization" theory falls short of explaining how universal jurisdiction is applicable to pirate negotiators, or more importantly those individuals who act from the Somali mainland to enable piracy.

Both the geographic limitation and the "de-nationalization" rationales for universal jurisdiction fail to explain how universal jurisdiction should be exercised over pirate enablers. Indeed, the opposite seems true: the geographic rationale for universal jurisdiction only seems to gain traction when it is limited to the "high seas." The traditional rationales for exercising universal jurisdiction favor limiting prosecutions to acts that occur on the high seas.

B. Respecting Somali Territorial Jurisdiction by Deferring to the International Community

As a matter of international policy, using US federal courts to prosecute acts of intentional facilitation that occur within the territorial waters of a state, or on a state's mainland, seems to invade the providence of Somali sovereignty and has the potential to produce absurd results. Opponents of the high seas requirement have argued that extending liability to those "inciting or intentionally facilitating"[337] piracy on dry land could allow prosecutors to charge pirate financiers and kingpins with the crime of piracy.[338] The cases of *U.S. v. Shibin* and *U.S. v. Ali* seem to provide a strong legal basis for this position.[339] At first glance, the benefits of prosecuting individuals higher up on the piracy hierarchy may seem enticing—such prosecutions would provide a significant disincentive to finance piracy operations by effectively attacking piracy at its source.[340]

---

335. United States v. Ali, 870 F. Supp. 2d 10, 17 (D.D.C. 2012).

336. *See* Lang Report, *supra* 2, at 13-15 (discussing the ubiquitous nature of piracy in Somali society, culture, and economy).

337. UNCLOS, *supra* note 58, art. 101(c).

338. Guilfoyle, *supra* note 262; *see also* Bellish, *supra* note 303.

339. *See* United States v. Ali, 885 F. Supp. 2d 17, 21 (D.D.C. 2012), *opinion vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *rev'd in part*, 718 F.3d 929 (D.C. Cir. 2013), and *aff'd in part*, 718 F.3d 929 (D.C. Cir. 2013); United States v. Shibin, 722 F.3d 233 (4th Cir. 2013).

340. Thomas Kelly Remarks, *supra* note 8; *see also* S.C. Res. 2020, *supra* note 36 ("Recognizing the need to investigate and prosecute not only suspects captured at sea, but

Other commentators have already expressed trepidation at the prospect of expanding liability in such a way.[341] If someone negotiating a ransom on dry land is a pirate, then who else can be subject to criminal liability? Simply put, where does criminal liability end?

The US government has argued that "[o]nce a nation has jurisdiction over a crime . . . it has jurisdiction over all those who participated in the crime, regardless of the location where those co-conspirators acted."[342] The government's position seems to contemplate a truly broad basis for the assertion of universal jurisdiction. In *Shibin*, the government reasoned that "Shibin participated in crimes against the international community, and justice for those crimes stops at no national boundary."[343]

The government's theory relies on the following argument: assuming that a pirate financier or kingpin can be brought into the United States, as is required under 18 U.S.C. § 1651, the government would charge that individual under both 18 U.S.C. § 1651 and 18 U.S.C. § 2. The latter provides: "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[344] The "offense against the United States" would be piracy under the "law of nations" as provided in 18 U.S.C. § 1651. The "law of nations" definition of piracy contained in 18 U.S.C. § 1651 is provided in UNCLOS article 101(c), which in turn explicitly references acts contained in UNCLOS article 101(a) and (b). Subsection (a) categorizes as piracy "acts of violence or detention . . . on the high seas."[345] Thus, someone who has committed an act of "incite[ment] or intentional[] facilitat[ion]" of an "act[] of violence or detention" has also committed piracy under the "law of nations."[346] The government reasons that those who "aid[], abet[], counsel[], command[], induce[] or procure[]" acts under UNCLOS article 101(a) or (b) can be charged with piracy, as principals, under 18 U.S.C. §§ 1651 and 2; and because § 2 contains no high seas requirement, they can be convicted of the crime of piracy itself.[347]

Prosecuting the enablers of piracy—the financiers, kingpins, and politicians—under UNCLOS article 101(c) and 18 U.S.C. §§ 1651 and 2, seems to stretch the definition of piracy, and the limits of universal jurisdiction, to the point of producing absurd results. First, it seems to cross a careful line drawn by the UN Security Council: "*[r]eaffirming* its respect

---

also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks. . . .") (alteration added).

341. *See* Volokh, *supra* note 54.

342. Government's Response, Shibin, *supra* note 262.

343. Government's Response, Shibin, *supra* note 262.

344. 18 U.S.C. § 2(a).

345. UNCLOS, *supra* note 58, art. 101.

346. *Id.*

347. *See* Government's Response, Shibin, *supra* note 262.

for the sovereignty, territorial integrity, political independence and unity of Somalia. . . ."[348] This resolution is violated when the United States prosecutes individuals for acts that occur solely within Somali territorial jurisdiction and from within the Somali mainland. Second, allowing states to exercise universal jurisdiction over acts occurring in territorial jurisdictions diminishes predictability by erasing a clear end to liability. Pirate financing often occurs through a pirate committee which is comprised of investors and commanders who help prepare and carry out both sea and terrestrial operations.[349] Often, accountants support the investors and managers while the actual pirate operations are supplied by Somali cooks.[350] Under the broad jurisdictional interpretation offered by the government in *Shibin* an accountant on the Somali mainland who tabulates and distributes profits for a pirate financier has seemingly "aid[ed]" in piracy under 18 U.S.C. §§ 1651 and 2. Likewise, a Somali cook living in Mogadishu, who prepares food for a piracy raid, could, if brought into the United States, be convicted of "aiding"ipiracy under 18 U.S.C. §§ 1651 and 2.[351] These hypothetical scenarios highlight the anomalous nature of the holdings in *United States v. Ali* and *United States v. Shibin*.

If liability can extend to individuals who act on dry land, there is a concern about the discretionary power of a state to expand liability to acts that have traditionally not been considered piracy. As Chief Justice John Marshall put it:

> A pirate, under the laws of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. . . . But piracy, under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation can increase or diminish the list of offenses thus punishable.[352]

To be sure, the question of whether to prosecute a pirate accountant or a Somali cook is still a matter of prosecutorial discretion, pursuant to

348. S.C. Res. 2020, *supra* note 36, ¶ 6 (emphasis added).

349. U.N. Security Council, Letter dated 18 July 2011 from the Chairman of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, 228, U.N. Doc. S/2011/433 (July 18, 2011) [hereinafter U.N. Security Council letter]; *see also* GEOPOLICITY, THE ECONOMICS OF PIRACY: PIRATE RANSOMS & LIVELIHOODS OFF THE COAST OF SOMALIA 6-8 (2011), *archived at* http://perma.cc/8N9U-T7PC (detailing the pirate value chain model through consideration of both sea and land based support activities).

350. U.N. Security Council letter, *supra* note 349.

351. *See* Volokh, *supra* note 54 (asking, "what about the guys who sell food to Somali pirates?").

352. United States v. Ali, 885 F. Supp. 2d 17, 27 (D.D.C. 2013).

UNCLOS article 105 and state municipal law. This Note recommends exercising prosecutorial discretion to impose limitations upon the kinds of acts that should be prosecuted under 18 U.S.C. §§ 1651 and 2, while deferring to the international community to bring high-ranking pirates to justice.

Finally, the marginal cost to the United States of prosecuting pirate enablers seems to substantially outweigh the negligible benefit. An estimated 70 to 86 percent of ransom proceeds go to the instigators and individuals providing tacit political support to pirate networks.[353] This means that the vast majority of the piracy proceeds go to individuals who likely never have to enter the high seas. The current, yearly cost of naval operations is estimated at more than $1 billion,[354] and the cost of securing ships with armed guards is about $50,000 per vessel.[355] Moreover, the twenty counties that have arrested, detained, or tried Somali pirate suspects, spent about $16.4 million to prosecute and imprison those Somalis suspected of piracy in 2011 alone.[356] The benefit, to the United States, of using universal jurisdiction to prosecute pirates is likely low; in fact, at least one commentator has argued that using universal jurisdiction to prosecute pirates is economically inefficient.[357] When a county uses universal jurisdiction to prosecute a pirate, the prosecuting country removes a negative externality from the globe, while internalizing the cost of the prosecution.[358] In other words, "[t]he prosecuting state bears all the cost of a complex prosecution, while the entire community of nations benefit from the deterrent effect of that prosecution on future pirates."[359] Any benefit the United States derives from prosecuting pirate enablers is likely outweighed by the cost of carrying out the prosecution—that is, when the basis for jurisdiction is universality.

Prosecuting pirate enablers under universal jurisdiction is further inadvisable given that the international community is already taking steps to disrupt the efforts of high-ranking pirates. Working Group 5 of the Contact Group on Piracy off the Coast of Somalia has facilitated the coordination of the sixty countries and twenty international organizations working to combat the scourge of piracy.[360] Working Group 5 has ramped up efforts to identify and interrupt the financial networks of pirates by building up anti-

353. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 118.

354. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 168.

355. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 168.

356. BOWDEN & BASNET REPORT, *supra* note 5, at 2.

357. Jonathan Bellish, *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy* Jure Gentium *and Its (Lack of) Implications for Impunity*, 15 SAN DIEGO INT'L L.J. (forthcoming 2013) (manuscript at 43), *archived at* http://perma.cc/LM9Z-ZRX6.

358. *Id.*

359. *Id.*

360. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at xxi, xxii.

money laundering regulations and implementing regional programs, aimed at disrupting financial flows into piracy networks.[361] The United States should defer to the international community because the cost of combating piracy is very high, and because the international community, through organizations like Working Group 5, is better poised to fight the scourge of piracy on the Somali mainland.

Outlining a specific, international plan to deal with the prosecution of "white-collar" acts of pirates is well beyond the scope of this Note. Instead, this Note recommends that the United States consider some of the potential deleterious effects of relying on a theory of universal jurisdiction to prosecute high-ranking pirates who never personally act on the high seas. Such a consideration favors limiting piracy prosecutions to those individuals who act on the high seas.

VI. CONCLUSION

The United States should exercise discretion and defer to the international community to prosecute high-ranking pirates. Although the United States has an interest in prosecuting pirate negotiators, kingpins, and financiers, the policy rationale for universal jurisdiction, a respect for Somali territorial jurisdiction, and practical concerns about the sustainability of prosecuting high-ranking pirates all favor deference to a unified international solution. To be sure, the benefits of prosecuting high-ranking pirates are appealing at first blush; however, this Note raises some cautionary advice—relying on universal jurisdiction to combat Somali piracy may, in some circumstances, undermine the very international framework the United States seeks to uphold.

361. PIRATES OF SOMALIA: ENDING THE THREAT, *supra* note 7, at 160.