

TERROR ATTACKS ON OUR SEAPORTS AND COASTAL ENVIRONMENT — AMERICA'S PRIMARY MARITIME ISSUE

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The targets of the attacks on America on September 11, 2001 were the World Trade Center towers in New York, the Pentagon and, perhaps, the White House. We do not know, and may never know the diverted destination of pirated Flight 93. Nor do we know whether or when there will be future foreign-terrorist attacks on America. But we know they have been conceived and planned. And we know that the conceived and planned attacks include America's ports and other coastal areas.

1.

To appreciate the degree to which America is vulnerable to an attack on her shores, consider that we have 95,000 miles of coastline. That figure is at first unfathomable.

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(California's coastline is a little over a thousand miles.) But remember that we have one mid-ocean archipelagic state, Hawaii, another state with extensive coastlines (owing to its sheer size and to its many islands), Alaska, and five oceanic island territories. They are Guam, the commonwealths of the Northern Mariana Islands and of Puerto Rico, the American Virgin Islands and American Samoa.

In addition to the length of our coastline, American's Exclusive Economic Zone—the zone of exclusive resource jurisdiction that since 1983 has extended seaward from our coastlines 200 nautical miles, consists of 3.5 million square miles. By the year 2025, government demographers predict, perhaps as much as three-fourths of the American population will reside in the coastal zone. The reasons terrorists have targeted America's coastlines are plain.

The Nation's container ports are virtual emblems of the vulnerability of the Nation's coastlines. In 2001, 18 million metal shipping containers entered America's ports, 6 million of which, fully loaded, came from overseas. The biggest container ships carry as many as 8,000 containers at a time. Some are already used by international criminals to transport drugs and contraband of other varieties. In one notorious case, European authorities found a suspected terrorist comfortably ensconced within a container containing food, water, a laptop computer,

cell phone and spare batteries. Al-Qaeda has drawn up plans to carry terrorists, or remotely detonable bombs, in these containers.²

An enemy with the goal of unleashing a weapon of mass destruction on American shores would consider, perhaps first, transporting it here on board a vessel, particularly within a maritime container. A missile launched from beyond our shores would not be a first choice. For when launched, a missile produces a pronounced signature, and the United States could deliver a devastating retaliatory strike. Bin Laden, if he is alive, or some rogue state, then, would likely choose an alternative such as loading a chemical weapon into a container originating in Karachi and destined for Oakland, Chicago, or Newark. Such a terrorist might use a Pakistani exporter with a record of trade with the United States. The container, or its cargo, would be fitted with a global-positioning-system (GPS) device so that it could be tracked by its dispatchers as it moved through Singapore or Hong Kong to mingle with the more than half a million containers handled by each of these ports every month. It would arrive in the United States at the Port of Oakland where it would be loaded onto a railcar for the transcontinental trip to its ultimate target destination. America's current regulations do not require an importer to file a cargo manifest with the United States Customs Service until the cargo reaches its "entry" port—say Newark, 2,800 miles away from where it first entered the United States. Moreover, the importer is permitted 30 days' transit time to make the trip to the East Coast. When the container reaches the rail yard outside Chicago, one of the most

² The Economist, February 9, 2002, p. 28

important such hubs in the United States, the weapon could be set off long before its contents were even to have been identified as having entered the country.³

Oakland, Vancouver, Seattle, Los Angeles and Long Beach are the prime targets among container ports on the West Coast. Newark-New York is the first target on the East Coast.

Then there are the country's oil ports. One pier in the Port of Long Beach offloads forty-five percent of all the maritime crude shipments (408,000 barrels per day) or roughly twenty-five percent of all the crude oil consumed by California. The State's refineries are all operating at full capacity. At any time California has only enough oil stored to supply it for two days.⁴

In addition to oil ports, there are oil refineries at many areas along America's coastline. There are refineries here in Galveston, and along the Houston Ship Channel. There is a refinery at El Segundo, California, beneath the takeoff pattern at Los Angeles International Airport. There are six refineries in the San Francisco Bay estuary system, from Richmond to Martinez. Oil rigs dot the continental shelves of American's Gulf Coast, a Southern California's coast. Sewage-treatment facilities in even greater numbers line America's shorelines. America's mostly decrepit nuclear-power generation facilities are located on

³ Commander Stephen E. Flynn, U.S. Coast Guard, *Homeland Security is a Coast Guard Mission*, (U.S. Naval Institute Proceedings October 1, 2001)

⁴ Stephen E. Flynn, "Homeland Security is a Coast Guard Mission." U.S. Naval Institute Proceedings Oct. 1, 2001.

shoreline areas, too. The San Onofre nuclear plant on Southern California's coastline squats near population centers between long, popular surfing and bathing beaches.

America's enemies in this war know the vulnerability of America's coasts. We know that they know our vulnerability, but we know very little more, other than that they have planned attacks on our coastlines. In planning their coastal attacks on America, our enemies have their models. The principal model is Iraq's attacks on the Persian Gulf environment of Kuwait in 1991. It is useful to consider those Iraqi attacks.

2.

Iraq invaded Kuwait on August 2, 1990. It occupied Kuwait for nearly seven months, until late February of the following year, when Kuwait was liberated by Operation Desert Storm, a coordinated military action by the United Nations Allied Coalition and Kuwaiti armed forces. A report to the United Nations Secretary General soon after the liberation occurred observed that Kuwait's "electric power, telecommunications and transportation systems had been wrecked, government buildings and other public institutions heavily damaged or looted" and that "much of the country's petroleum industry was pillaged and sabotaged. The latter is perhaps most graphically evidenced by the hundreds of fires that were set off by blowing up the oil wells."⁵

⁵ *Report to the Secretary-General by a United Nations Mission, led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Scope of Damage and the Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991*, Annex, at 13-14, U.N. Doc. S/22535 (1991).

The effect on the environment of Iraq's actions was described as "near apocalyptic" by a United Nations mission headed by Undersecretary General Martti Ahtisaari.⁶ As early as September of 1990, Iraq's President Saddam Hussein had threatened to blow up the oil wells of Kuwait if United Nations forces sought to oust him from that country.⁷ A week before the ground war began on February 24, 1991, each well in the Greater Burgan oil field, the largest in Kuwait, was dynamited by Iraqi forces. Most of the 684 wells were blown open at the base of the wellhead by packing down the dynamite charges with sandbags. Iraq's troops had set fire to the Al Wafra oil field near the border with Saudi Arabia in southern Kuwait on January 22, 1991.⁸ The Claim of Kuwait filed with the UNCC alleges that, in all, Iraq detonated 798 oil wells, and 604 burned. Some sense of the unprecedented magnitude of this devastation can be derived from the fact that, in the history of oil drilling, never before had more than five wells burned, anywhere on earth, at one time.⁹

The Persian Gulf's marine and coastal environments suffered most from the Iraqi sabotage and depredations. There was spillage into the Gulf where wellheads near the coast were blown off, but did not ignite. In addition, Iraq had deliberately spilled as much as three million barrels of oil into the Gulf in January, prior to the ground war. (These spills were

⁶ *Survival Is Harsh, Recovery Slow in Hard Hit Areas: Aftermath of the Persian Gulf War*, U.N. Monthly Chron., Sept. 1991 at 16.

⁷ Eugene Linden, *Getting Blacker Every Day*, Time, May 27, 1991, p. 50.

⁸ Suzanne M. Bernard, *Environmental Warfare: Iraq's Use of Oil Weapons During the Gulf Conflict*, 6 N.Y. Int'l. L. Rev 106, 107, and notes 20-24.

⁹ *Id.*, at 107, citing Eric Schmidt, *After the War: The Environment, Fouled Region is Casualty of War*, N.Y. Times, March 3, 1991, at A19.

from two Iraqi tankers, from the Iraqi offshore terminal at Mina Al Bakr, and from the Kuwaiti pipelines connecting to the Sea Island Terminal, five miles off the coast of Kuwait.¹⁰ The Iraqi “aim was to transform the Gulf into a huge oil lake that could be ignited if the Allied forces tried to liberate Kuwait by penetrating its coasts.”¹¹ The Iraqis also mined the Gulf with thousands of explosive devices that had to be detonated by Allied naval forces in order to permit them to maneuver their ships. The detonations caused vast destruction, not to mention pollution, of the marine environment. In addition, the Iraqi occupying forces destroyed four sewage-treatment facilities, at al-Rig’i, Jahra, Riqqa, and Failaka. The combined capacities of these facilities were 330,000 cubic meters of raw sewage per day. Until repairs were completed, the sewage was discharged into the Gulf, infecting it with microbes, viruses and harmful bacteria. Finally, the Gulf was polluted from the “black rain” precipitated from the smoke clouds of the oil-well fires.¹² The black rain persisted for five months (blessedly, not the five years originally predicted).

The spill of the *Exxon Valdez* into the waters of Prince William Sound, Alaska — familiar to many American television viewers—was approximately 275,000 barrels of oil. Some estimates of Iraq’s total spillage of oil into the Gulf put it at 40 times the *Valdez* spill — that is, at about 10 million barrels, which mingled with the raw sewage and Iraqi mines.

¹⁰ Richard Lacayo, *A War Against the Earth: Torching Oil Wells and Disgorging Crude into the Gulf, Saddam Makes the Planet His Latest Victim*, Time, Feb. 4, 1991, at 32, cited in Bernard, at 107.

¹¹ Hussain ‘Isa Mal Allah, *The Iraqi War Criminals and Their Crimes During the Iraqi Occupation of Kuwait* (Center for Research and Studies on Kuwait, Kuwait, 1998), p. 327. (This source estimates this deliberate spillage into the Gulf at between 2 and 6 million barrels.)

¹² *Id.* at 327-328.

Another quantity of oil, perhaps as much as a hundred times the amount spilled into the Gulf (that is, perhaps one billion barrels), was either incinerated or was spilled onto the land. Vast oil "lakes," some still a meter deep, have drowned the desert ecosystems in the Kuwaiti oil fields.

(Aside from Kuwait itself, the nations most affected by this environmental devastation were the Kingdom of Saudi Arabia, The Islamic Republic of Iran, the Hashemite Kingdom of Jordan, and The Syrian Arab Republic. The five states each have pending before the United Nations Compensation Commission substantial claims for environmental damage and natural resource depletion.)

America's enemies have ties with the Iraqi regime, and access to the regime's textbooks on coastal terrorism.

3.

What legal mechanisms exist for increasing the security of America's ports and other coastal areas from terrorist attacks?

Since 1945, America has expanded its maritime zones of jurisdiction and sovereignty far beyond their traditional, historical limits. Except for the Continental Shelf Proclamation though (discussed below), virtually no measures have been taken to implement the declarations

of expanded maritime zones. These zones hold the first promise for a more secure—legally and in fact— American coastline.

Historically, the United States claimed only the traditional three-mile territorial sea.¹³ On September 28, 1945, just weeks after V-J Day, the United States declared exclusive resource jurisdiction over the “continental shelf.”¹⁴ Without undo elaboration, the Continental Shelf Proclamation was a pronounced departure from recognized international law, and drew emphatic protests from around the world.

In 1966 the United States proclaimed a Contiguous Fishery Zone having a width of nine miles immediately adjacent and contiguous to the three-mile territorial sea.¹⁵ Such a zone was an area of “jurisdiction,” not sovereignty, and was not recognized in international law until the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone went into force September 10, 1964.

On March 10, 1983, the year after the United Nations Convention on the Law of the Sea had been executed (though not by the United States, which has yet to sign it), President Reagan proclaimed a 200-mile Exclusive Economic Zone for the United States. In an

¹³ Proclamation of Secretary of State Thomas Jefferson, April 22, 1793, T. Fulton, *The Sovereignty of the Sea* 572-74 (1911).

¹⁴ Proclamation No. 2667, “Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf,” September 28, 1945, 10 Fed. Reg. 12303, 3 CFR, 1943-1948 Comp., p. 67 (reprinted in Whiteman, 4 Digest of International Law (1964), pp. 756-757).

¹⁵ Public Law 89-658; 80 Stat. 908

accompanying Oceans Policy Statement of that date, the President declared that the boundary principles found in the 1982 Convention had become—notwithstanding America’s refusal to sign, much less ratify, the Convention—“customary international law.”¹⁶

On December 28, 1988, President Reagan, in one of his last acts as Chief Executive, proclaimed that America’s territorial sea henceforth extended to 12 miles from its coast line—not the traditional three miles. (This presidential proclamation did not address the contiguous zone. And so, at this point, America’s territorial sea and its contiguous zone were precisely coextensive.)¹⁷ A territorial sea of 12 miles’ breadth is authorized by the 1982 Law of the Sea Convention, but by no other treaty. The United States, again, is not party to the 1982 Convention. A question thus arises whether America’s claim to a 12-mile territorial sea — like its claim to an EEZ — is valid. But that is for another paper.

Finally, on September 2, 1999, President Clinton extended America’s contiguous zone to the maximum permitted distance from the coast line permitted under the 1982 Convention — 24 miles.¹⁸

Definitions are in order:

¹⁶ Proclamation No. 5030, March 10, 1983, 48 Fed. Reg. 10605 (1983), *reprinted in* 22 I.L.M. 461 (1983).

¹⁷ Proclamation No. 5928, December 27, 1988, 54 Fed. Reg. 777 (1989), *reprinted in* 28 I.L.M. 284 (1989).

¹⁸ Proclamation No. 7219, August 2, 1999, 64 Fed. Reg. 48701.

The Territorial Sea. The territorial sea is an extension of a nation's sovereignty over its land area into adjacent sea. Within the territorial sea, the nation's sovereignty is as full as over its land territory, with the exception of the right of foreign vessels to make "innocent passage."¹⁹

The Contiguous Zone. The contiguous zone beyond the territorial sea is an area in which the coastal nation has limited jurisdiction to "exercise the control necessary to" prevent violations of its customs, fiscal, immigration or sanitary laws within the territorial sea, or within its land territory.²⁰

The Continental Shelf. The 1958 Convention on the Continental Shelf defined the continental shelf by what was known as the "exploitability" criterion. That is to say, the continental shelf extended waterward to a depth of 200 meters and, beyond that, to whatever depths permit the exploration of the resources of the seabed and the subsoil of the Shelf. This criterion has been supplanted in Article 76 of the 1982 Convention. The new formulation provides: "The Continental Shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline from which the breadth of the Territorial Sea is measured where the outer edge of the continental margin does not extend up to that distance."

¹⁹ *United Nations Convention on the Law of the Sea*, Montego Bay, December 10, 1982, *entered into force November 16, 1994* in XXI *ILM* (hereinafter "UNCLOS"), Art. 2

²⁰ UNCLOS, Art. 33

The geologic definition of the continental margin contained in the 1982 Convention is exceedingly complicated, but suffice it to say that, in certain geological circumstances, the 1982 Convention permits states to claim continental shelves to distances as great as 350 nautical miles from the baseline from which the territorial sea is measured. Two claims, by Chile and by Ecuador, each made in September of 1985, provide examples. On September 12, Chile proclaimed jurisdiction over the Continental Shelves of the Easter and Sala y Gomez Islands extending to a distance of 350 nautical miles from the territorial-sea baseline. On September 19, Ecuador issued a similar proclamation asserting its jurisdiction over the Continental Shelf extending between mainland of Ecuador and the Galapagos Islands. The United States contested the claims on the ground the geologic facts did not satisfy the criteria of Article 76.4 of the 1982 convention.²¹

Whether the United States, which has not signed the 1982 Convention, is permitted to claim a continental shelf in accordance with Article 76 is a nice question.²²

The Exclusive Economic Zone. The exclusive economic zone is an area of even more limited jurisdiction, and of partial sovereignty. This zone may extend to a distance of 200 miles from the coastal nation's coast line. Within the Exclusive Economic Zone, the coastal state has:

²¹ See Kilaparti Ramakrishna, Robert E. Bowen, and Jack H. Archer, "Outer Limits of the Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U.S. Response," 11 Marine Policy 56-68 (Jan. 1987).

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this convention with regard to:
 - . . .
 - (iii) *the protection and preservation of the marine environment.*²³ [Emphasis added.]

When there is reason to believe, then, that Iraqi-style coastal terrorism will occur, interdiction should be legal in the 200-mile Exclusive Economic Zone. But again, the United States has enacted no legislation to implement its 1983 EEZ Proclamation.

These four maritime zones—the territorial sea, the contiguous zone, the continental shelf, and the exclusive economic zone—are each recognized and “legislated” for in the 1982 Convention on the Law of the Sea. (The United States, again, with 20 years since the Convention was “done” in 1982, has refused to become party to it.)

From another source of international law—that is, a source other than the 1982 Convention—a legal principle emerges that permits a coastal state to take “preemptive” strikes against vessels that threaten security, especially environmental security, of the coastal nation.

²² The United States ratified the four 1958 Geneva Conventions, which had been sent to the Senate for ratification in 1959 by President Eisenhower, in 1961. The Continental Shelf Convention, like the Territorial Sea Convention, went into force in 1964. Hollick, U.S. Foreign Policy and the Law of the Sea (1981) 159 and 442.

²³ UNCLOS, Art. 55, 56.

That other source is “customary” international law (that is, international law not based on treaty). The principle is the “precautionary principle.”²⁴ Whether the principle really exists is heatedly debated by scholars, most recently at a conference held at the University of California last month.

These underutilized legal principles provide security and enforcement opportunities for the United States. Still, they are hardly necessary for the world’s foremost maritime and naval power. When it has suited our convenience, and when we have had the might to carry it out, as we do now, we have boldly and unilaterally claimed whatever coastal and maritime jurisdiction we needed for our national interests. The Continental Shelf Proclamation of 1945, which represented a radical break with international law, is the best example.

How has the international legal community, and the federal government, responded in a legal way?

In the international arena, the United Nations has responded in general terms. Resolutions of the General Assembly and of the Security Council have denounced terrorism.²⁵ These pronouncements, however general, may supply international legitimacy to extreme legal measures that may be taken by the United States.

²⁴ See, e.g., E. Hey, “The Precautionary Principle in Environmental Law and Policy: Institutionalizing Caution,” in *Georgetown International Environmental Law Review*, 1992, pp. 303-318.

²⁵ G.A. Res. 56/1, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/1 (2001), *reprinted in* 40 I.L.M. 1276, and S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001), *reprinted in* 40 I.L.M. 1277, S.C. Res. 1373, U.N.

Congress has since September 11 been considering a plethora of bills, most prominent being S. 1214, the Port and Maritime Security Act of 2001 (Hollings). S. 1214 would provide for extensive maritime security studies, screening for all “security sensitive” employees in the maritime arena, would require more rigorous cargo identification and tracking, and require crewmember identification. In addition it would authorize Coast Guard “sea marshals” to board vessels 12 nautical miles offshore. I question why the authority of the sea marshals should not extend to 200 miles offshore, given the 1983 Exclusive Economic Zone Proclamation.

There is some residual authority in the coastal states, and possibly in the territories. A decision of the United States Supreme Court decision now 60 years old, *Skiriotes v. Florida*, 313 U.S. 69, 75 (1941), holds that the states may regulate the activities of their residents in areas where the federal government chooses not to. When S. 1214, or some variant of it, is signed into law, the coastal states and territories should parse it for its gaps, and legislate as they see fit to protect their coasts.

What is needed now is a marshalling of the available legal authorities, and their recitations in articles or in journals such as the American Journal of International Law. For any American legal response must have the respect of the international legal community.

SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001), *reprinted in* 40 I.L.M. 1278 (2001) , S.C. Res. 1377, U.N. SCOR, 4413th mtg., U.N. Doc. S/RES/1377 (2001), *reprinted in* 41 I.L.M. 503 (2002).

Needed too are more innovative ways of preventing terror attacks on our coasts. To take only the vulnerability of ports, what may be needed is an army of inspectors aboard container ships bound from Yokahama or Singapore or Shanghai to Oakland or Long Beach or Los Angeles, x-raying and in other ways inspecting each cargo container before it enters American waters. That kind of mid-ocean inspection, however, requires substantial separation of the ranks and columns of containers aboard ship, so that the inspectors can get to them, and inspect them. That in turn would entail substantial costs in refitting the container-stacking conditions aboard ship, would reduce the number of containers that could be carried, and would cut shipping revenues. Just as Intertanko and the world's other oil-tanker operators resisted double-hulling their vessels following the *Exxon Valdez* spill, the container-ship operators will not readily concede the need to reconfigure their ships to permit transoceanic inspections.

Who has a better idea to thwart the bomb in the box?