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BROKEN TAILLIGHT AT SEA:  
THE PEACETIME INTERNATIONAL LAW OF  
VISIT, BOARD, SEARCH, AND SEIZURE

*Commander James Kraska, JAGC, USN\**

I. INTRODUCTION—NORMS AND REGIMES FOR SHIP BOARDING IN  
PEACETIME

Globalization and the rapid expansion in international trade over the past twenty years were made possible only by growth in international maritime shipping.<sup>1</sup> International merchant shipping is the lifeblood of the global economy, assimilating nations economically and serving as the principal catalyst for the political and cultural phenomenon of globalization. In recent decades, the world's marine transportation system has grown exponentially, accelerating interstate and transcontinental integration. As the number of container cargo ships, bulk carriers, and tanker vessels has increased, port facilities on every continent have expanded rapidly to accommodate additional maritime

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1. See MARC LEVINSON, *THE BOX: HOW THE SHIPPING CONTAINER MADE THE WORLD SMALLER AND THE WORLD ECONOMY BIGGER* (2006) (proposing that globalization was made possible by the advent of the shipping container).

traffic. With international merchant shipping now playing a central role in joining together nations and continents commercially and politically, the system has become more vulnerable to misuse or attack.

As the world marine transportation system has grown in importance, it has become a more attractive vector for militants, terrorists, international criminal organizations, and armed groups.<sup>2</sup> Parasitic groups mask illicit activities throughout the marine cargo chain infrastructure, or exploit the system as part of a strategy of asymmetric warfare against prosperous and democratic states. Regional ethnic and clan-based pirates, extremists, and separatist and freelancing smugglers infect the marine transportation system for political, economic, and military purposes. Leveraging the anonymity afforded by the vast tyranny of time and distance in the oceans, the resulting lawlessness destabilizes nations on every continent.

To counter these threats, maritime law enforcement, coast guards, and naval forces conduct constabulary patrols and maritime security operations (MSO). States employ warships and law enforcement vessels, as well as submarines and aircraft, to patrol the ocean commons, particularly throughout the coastal zone. Ideally, threats can be disrupted on the land, before they manifest an immediate danger, or along the sea-shore interface in port facilities, roadsteads, and inshore waters. It is more practical, and often easier, to respond to threats on land than it is at sea, as authorities on land can more quickly coordinate and bring to bear against a threat a wider variety of intelligence assets and security forces. For this purpose, nations operating port facilities may condition entry of port by foreign-flagged vessels on compliance with certain port state safety, security, environmental measures, and inspection regimes.

Searching a large ship at sea is impossible—containers cannot be moved about deck and tanks cannot be fully explored unless they are emptied. On other occasions, however, it may be prudent or necessary to counter threats farther out to sea, such as in the 200-nautical-mile (nm) exclusive economic zone (EEZ) or beyond that limit and on the high seas.<sup>3</sup>

While MSO include a wide variety of marine constabulary functions, naval forces employ doctrine and tactics, techniques and procedures for vessel interdiction or maritime interception operations (MIO). The term “MIO” itself encompasses a small assortment of naval missions,

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2. WILLIAM LANGEWIESCHE, *THE OUTLAW SEA: A WORLD OF FREEDOM, CHAOS, AND CRIME* 5-8 (2004).

3. A nautical mile is equivalent to one minute of latitude at the equator and is 1,852 meters or 6,076 feet in length. A statute mile on land is 5,280 feet in length.

including naval control and protection of shipping, diversion of vessels away from an area or into port, escort or protection of endangered vessels, and maintenance of maritime security zones and restricted access to sea areas. MIO also includes visit, board, search, and seizure (VBSS) of ships, and associated capture of dangerous persons or seizure of ships and cargoes.

The interception and boarding of a ship during peacetime involves the physical act of intercepting a vessel, which may include approaching and querying the ship (approach and possibly visit), stopping the vessel, sending a boarding team onto the ship (board), conducting an inspection or search of the ship and its cargo (search), and potentially apprehending persons on board and confiscating the ship or cargo (seizure). Maritime interception against suspect vessels may be conducted in consensual, permissive, or non-permissive environments, and in a wide variety of circumstances. Consequently, legal analysis for MIO and VBSS can become complex because it involves addressing two questions of mixed fact and law.<sup>4</sup> First, the commanding officer of the intercepting ship must acquire and maintain situational awareness of the vessel to be boarded in relation to the maritime zones and navigational regimes reflected in the United Nations Convention on the Law of the Sea (UNCLOS).<sup>5</sup>

As a general rule, MIO may be conducted by an intercepting vessel either in its own territorial sea, or outside the territorial sea—sovereign water and airspace—of any other state. Coastal states exercise sovereignty over their territorial sea, which normally extends 12 nm from the low water mark running along the shore. Although ships of all nations are entitled to exercise the right of innocent passage in the territorial sea, this right typically does not include the right to conduct VBSS. Interception of a vessel and executing a VBSS inside the territorial sea of a coastal state without its consent typically would be regarded as an interference with the sovereignty of a coastal state.

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4. The U.S. Navy defines MIO as “efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council Resolutions and/or prevent the transport of restricted goods.” THE NAVAL SERVICE, NAVAL DOCTRINE PUBLICATION 1: NAVAL WARFARE 37 (2010). VBSS is defined as follows: “procedures by which U.S. forces conduct maritime interception operations in order to determine the true character of vessels, cargo, and passengers.” DEP’T OF THE NAVY OFFICE OF THE CHIEF OF NAVY OPERATIONS, NAVY SUPPLEMENT TO THE DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 2-88 (2010).

5. United Nations Convention on the Law of the Seas, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

Although ships enjoying the right of innocent passage may use force in self-defense, a coastal state has responsibility for the maintenance of maritime security and marine law enforcement inside the territorial sea. Assuming that the state conducting a VBSS has authority to exercise enforcement jurisdiction in the water space of the suspect vessel—that is, the boarding is occurring either inside its own territorial sea or beyond other nations' territorial seas—a second and perhaps more complex line of inquiry must be addressed: the legal rationale for the boarding. Normally vessels are subject to the exclusive jurisdiction of the flag state—the nation in which the ship is registered. A warship may always exercise enforcement jurisdiction over its own ships as a matter of international law. If the vessel to be boarded is a foreign-flagged ship, however, there must be some additional basis for a warship to exercise enforcement jurisdiction over it.

Exceptions to exclusive flag state jurisdiction exist in times of war or armed conflict, such as the belligerent right of visit and search of a vessel to determine the enemy character of the ship or its cargo.<sup>6</sup> The belligerent right of visit and search, which is a product of the law of naval warfare, is a separate legal right from peacetime MIO and VBSS.<sup>7</sup> Belligerent parties to a conflict are entitled to board neutral ships anywhere in the oceans outside the territorial sea of a neutral state for the purpose of ascertaining the enemy character of the ship or its cargo. This wartime right is distinct from the aforementioned peacetime rule, in which the warship of one nation normally may not assert jurisdiction or control over a ship registered in another state. In time of peace, VBSS may only occur against a foreign-flagged ship subject to some other legal rationale that serves as an exception to exclusive flag state jurisdiction.

Generally, the state in which a ship is registered—the flag state—exercises exclusive enforcement jurisdiction over vessels flying its flag. There are exceptions to this universal rule, however. In contrast to the special ship boarding regimes applicable during times of war, the legal rationale for boarding foreign-flagged vessels in peacetime are more numerous, and in several respects more complicated. While the law of naval warfare is a rather discrete body of authority with well-developed ship boarding measures, the rules for ship boarding during peacetime

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6. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 25-29 (Louise Doswald-Beck ed., 1995).

7. For a thorough treatment of the belligerent right of visit and search during time of armed conflict, see Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CAN. Y.B. INT'L L. 283 (1991); see also Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments Since 1945*, 30 CAN. Y.B. INT'L L. 89 (1992).

draw on a milieu of sources, and they arise more often. In both war and peace, however, only warships or government vessels on non-commercial service, such as marine law enforcement or coast guard ships, may exercise VBSS. The terrorist attacks against the United States on September 11, 2001, and the broadened sense of vulnerability to weapons of mass destruction (WMD) has drawn even greater variation into the peacetime composite of norms and regimes. The 2001 attacks illustrated a shocking breach of security in the aviation transportation system, and in doing so also exposed glaring vulnerabilities in the maritime domain and worldwide cargo chain.

This Article focuses on the sources of international law that states may invoke as a legal basis for boarding foreign-flagged ships in time of peace. In many nations, additional implementing legislation provides a domestic basis for the activity in municipal law. Furthermore, states conducting VBSS have developed an entire retinue of associated norms, regimes, regulations and doctrine that provide additional fidelity to custom and state practice. In U.S. waters, for example, boarding U.S. vessels for law enforcement purposes is most often conducted by the U.S. Coast Guard.

The Coast Guard uses the term “boarding” to mean an “armed intervention aboard a vessel to detect [or] suppress violations of applicable law.”<sup>8</sup> Once on board a ship, Coast Guard officers may conduct inquiries, boat inspections, searches, seizures, and arrests to enforce U.S. law. The Coast Guard’s authority may be exercised on waters subject to the jurisdiction of the United States, or against U.S. ships on the high seas.<sup>9</sup> The U.S. Navy also has extensive doctrine on the conduct of VBSS in unilateral, joint, or combined operational environments.<sup>10</sup> The Navy and Coast Guard are partner armed forces, and they often conduct VBSS together, with individual boarding teams comprised of U.S. Coast Guard Law Enforcement Detachments operating in conjunction with Navy boarding teams, which may include trained sailors, special operations forces, or U.S. Marine Corps commandos. Much larger organizations, such as the 2,200-person Marine Expeditionary Units (Special Operations Capable) or MEU/SOC of the

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8. MARITIME LAW ENFORCEMENT MANUAL § 3.A.2 (U.S. Coast Guard ed., 1983).

9. See 33 C.F.R. §§ 2.32, 2.36 (2009) (defining “high seas” and “waters subject to the jurisdiction of the United States”).

10. See, e.g., DEP’T OF DEFENSE, NAVY TACTICS, TECHNIQUES AND PROCEDURES MARITIME INTERCEPTION OPERATIONS 3-07.11M (2008) (note: this document has restricted distribution and is not publicly available).

U.S. Marine Corps, also are prepared to execute a VBSS or MIO throughout the peace-war continuum.<sup>11</sup>

There are a handful of especially crucial international rules and institutions that naval forces, coast guards, and maritime law enforcement authorities invoke as legal authority for boarding foreign-flagged merchant ships. The July 28, 2010, entry into force of a newly negotiated ship boarding regime—the 2005 Protocol to the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)—provides a timely point of departure for taking stock of the array of VBSS authorities in international law. There exist more legally comprehensive treatments of some aspects of VBSS, particularly within the best volume on the topic by Douglas Guilfoyle.<sup>12</sup>

The present study, however, is distinct in that it provides both a maritime operational context for the architecture of VBSS authorities in international law, connecting them to the naval forces that actually implement ship boarding operations, and also includes some background on United States approaches to development of the law. The original 1988 SUA treaty was adopted in the wake of the Palestinian terrorist attack on the Italian-flagged cruise ship, *Achille Lauro*. With the deposit of its instrument of ratification on April 29, 2010, the Republic of Nauru became the twelfth country to ratify the 2005 SUA Protocol. The twelfth ratification triggered a ninety-day clock, which ushered the treaty into force on July 28, 2010. Bulgaria became the seventeenth state to ratify the 2005 Protocol on October 7, 2010.<sup>13</sup>

As important as it is, the SUA treaty is only one international legal authority for boarding ships at sea, and the entry into force of the 2005 Protocol gives rise to the need for a broader understanding of the rest of the tools in the legal toolkit available to maritime security forces. Maritime security forces that seek to board a foreign-flagged merchant ship may obtain flag state permission, the consent of the master of the vessel, and under certain circumstances, board the ship as an exercise in lawful self-defense or pursuant to a U.N. Security Council Resolution adopted under Chapter VII. The exercise of port state control measures

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11. See, e.g., DEP'T OF DEFENSE, DEP'T OF THE NAVY, MARINE CORPS ORDER 3120.9B, POLICY FOR MARINE EXPEDITIONARY UNIT (SPECIAL OPERATIONS CAPABLE) (MEU/SOC) (2001) (outlining U.S. Marine Corps policy), available at <http://hqinet001.hqmc.usmc.mil/pp&o/POE/POE-301/Documents/MCO%203120.9B.pdf>.

12. See generally, DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 21-262 (2009).

13. Int'l Maritime Org. [IMO], *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Ratification by Bulgaria*, IMO DOC. SUA.3/Circ.16 (Oct. 12, 2010).

may facilitate boarding a ship at the pier, and foreign-flagged ships that violate certain coastal state laws may be boarded in the territorial sea or contiguous zone.

### *A. Ship Boarding and Sea Power*

Ship boarding has always been an important component of naval operations and sea power. For one thousand years, beginning in the ancient Greek world, extending through the centuries of the Roman Republic and Empire and into the early Middle Ages, naval warfare in the West was fought by soldiers embarked on galleys. There was very little change in the way galley warfare was conducted in the Greco-Persian wars in the fifth century B.C. and the Holy League contest against the Ottoman fleets in the fifteenth century. Warfare at sea essentially was ground combat fought from mobile, floating platforms; only with the introduction of mounted firearms did ships begin to fight against ships. The revolution in mounted cannons on Western warships, combined with the move to all-sail ships, propelled Western navies into technological preeminence, and world domination.

Beginning with the Iberian colonization of the New World and the emergence of the maritime states of the United Dutch Provinces and the United Kingdom, maritime security was a product of big-gun warships. For four centuries, the greatest threats to maritime security lay in the naval power of the Ottoman fleets, the impressive display of the Spanish armada, the aircraft carriers of the Imperial Japanese Navy, and the pocket battleships and U-boats of the German High Seas Fleet. During this period of conventional naval warfare, ship boarding primarily was a function of counter-piracy operations and prize law, as well as the belligerent right of visit and search in the law of naval warfare. But in the past three decades, the growth in insurgency, terrorism, and international criminal organizations have emerged from the process of social, political, and economic globalization. Piracy has made a comeback. Traditional navies have scrambled to adapt to and address these emergent and unconventional threats, reinvigorating the doctrine, policy, and international law of ship boarding.

## II. THREATS IN THE MARITIME DOMAIN

Today the most ominous maritime threats emanate not from enemy capital warships, but from the lower end of the threat spectrum. Merchant vessels serve as conduits for the movement of illicit and dangerous cargo, persons, and weapons. In countering this new threat,

capital warships are both more costly and less useful than smaller vessels. Instead of development of “breakthrough” weapons such as the Dreadnought battleship in 1906, the submarine in 1912, and the aircraft carrier in the 1920s and 1930s, today the rule of law serves as an effective force multiplier for enhancing maritime security.<sup>14</sup> And because ships must eventually enter into port, port state authorities, operating in nations that may have no navy at all, have become important nodes in ensuring the security of the world’s marine transportation system.

There are an increasing variety of violent, non-state actors operating in the oceans. Sub-state criminal and terrorist organizations plying the sea have multiplied. In March 1993, for example, Islamic terrorists clandestinely smuggled arms, ammunition, and explosives by ship from Karachi into the Indian state of Maharashtra, leading to devastating attacks. More recently, in December 2008, commandos from the Islamic terrorist group *Lashkar-e-taiba* traveled by sea on a hijacked Indian fishing vessel, infiltrating India. Once inside the country, the group went on a murderous rampage throughout Mumbai, killing nearly two hundred people and bringing the financial center of India to a standstill.

Across the forty mile wide Palk Strait in South Asia, neighboring Sri Lanka has recently ended a three-decades-long war of attrition against the Liberation Tigers of Tamil Eelam (LTTE). The small and fast suicide boats of the “Sea Tigers,” the maritime wing of the LTTE, were the most effective maritime terrorist platform in the world. Over the years, the Sea Tigers sank dozens of Sri Lankan ships—claiming a higher tonnage of vessels destroyed than any conventional naval force of the contemporary era. The group also engaged in numerous vessel hijackings, including the seizure of the *Irish Moa* in 1995, the *Princess Wave* in 1996, the *Athena*, *Misen*, *Morong Bon*, and the *MV Cordiality* in 1997, and the *Princess Kash* in 1998. The group also hijacked the Malaysian-flagged *MV Sik Yang* in 1999—neither the ship nor the sixty-three crew members were ever heard from again. In February 2008, the Sea Tigers sank a Sri Lankan fast attack craft in the sea of Thalaimannar, almost 200 nm from Colombo. Before the defeat of the LTTE, the Sea Tigers were extraordinarily successful, sinking over 30 percent of the small boats in the Sri Lankan navy. Although the LTTE eventually was defeated on land, the Sea Tigers were never beaten at sea, and their success represents the specter of a new face of maritime terrorism.

In the intervening decades since the LTTE began its campaign, other prominent maritime terrorist attacks have occurred throughout the world,

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14. Commander James Kraska, *Grasping “The Influence of Law on Sea Power,”* 62 NAVAL WAR C. REV. 113, 121-22 (2009).

including the bombing of Lord Mountbatten's private yacht in 1979 by the Provisional Irish Republican Army. In 2000, Al-Qaeda attacked the USS *Cole* (DDG 67) in Aden, Yemen. The slow, low-tech suicide assault on the USS *Cole* killed seventeen sailors and nearly sank the powerful warship. The attack on the French oil tanker *Limburg*, also by Al-Qaeda, occurred off the coast of Yemen in October 2002, and exposed the vulnerability of energy sea lines of communication between the Strait of Hormuz and thirsty markets in Europe and Asia. The deadly bombing of *Super Ferry 14* in 2004 by the Abu Sayyaf organization in the Philippines killed 116 people—the world's greatest maritime terrorist attack. Two years later, in 2006, a Chinese-made C-802 cruise missile launched by Hezbollah struck the Sa'ar 5-class Israeli Navy corvette, INS *Hanit*, heavily damaging the ship and killing four crew members. Even more recently, on July 28, 2010, the Japanese oil tanker *M Star* was damaged by an attack while traveling from Qatar to Japan.<sup>15</sup> The mysterious explosion appears to have been detonated by Abdullah Azzam Brigades, an Al-Qaeda-linked terrorist group.<sup>16</sup>

Even more creative maritime dangers may be on the horizon. In the Gulf of Guinea, for example, guerillas from the Movement for the Emancipation of the Niger Delta utilize small boat swarms to disrupt offshore oil infrastructure. There is a renaissance underway in the development of unmanned aerial systems in conventional armed forces. As the technology becomes ubiquitous, it could be misappropriated by insurgent groups and misused for developing water-borne improvised explosive devices. Commercial, off-the-shelf unmanned underwater vehicles that are used for oceanography may be converted into torpedoes or marine mines. Finally, social media and cell phones now may be used to network agitating "flash mobs" embarked on swarms of shallow water vessels that could converge at sea to endanger merchant shipping or block the mobility of warships. Nations have responded to these lower-order and evolving maritime threats, not by destroying ships, but by boarding them. In doing so, states invoke a range of legal and policy rationales for inspecting or searching a ship and seizing the vessel, or its crew, passengers, or cargo.

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15. *Mystery of Japanese Tanker Damage Probed*, BBC NEWS, July 29, 2010, available at <http://www.bbc.co.uk/news/world-middle-east-10803239>.

16. *Japanese Tanker was Damaged in Terror Attack, UAE Says*, BBC NEWS, Aug. 6, 2010, available at <http://www.bbc.co.uk/news/world-asia-pacific-10890098>.

III. THE NORMS IN THE LAW OF THE SEA—FLAG STATES, PORT STATES,  
AND COASTAL STATES

Contemporary international law of the sea has developed over the past four centuries of the modern world, yet some of the norms reflected in oceans law date to antiquity. The norm of freedom of the seas, for example, was championed by Ancient Phoenicia, and was a feature of the law and policy of Ancient Greece and Rome. Norms governing conduct at sea developed across historical periods during peace and war. International maritime incidents, and state responses thereto, are norm-indicators and norm-generators.<sup>17</sup> A norm exists in a given social setting to the extent that states or individuals usually act in a certain way and face consequences when they do not act in this way.<sup>18</sup> Realists would suggest that norms are upheld through rationalist pursuit of self-interest or national interest, but norms also inevitably reflect a sense of justice and morality. Although there is a deontological element to norms, it does not mean that sea power and politics are irrelevant.<sup>19</sup> Perhaps the strongest and most long-standing norm in oceans governance is exclusive flag state jurisdiction.

*A. Flag State Authority and Master's Consent*

With more than 155 state parties, UNCLOS is the “constitution” for the world’s oceans. The treaty reflects customary international law concerning operations at sea, providing a framework for peacetime maritime security operations. As a general principle, vessels in international waters are immune from the jurisdiction of any nation other than the flag state. This concept of exclusive flag state jurisdiction is the bedrock of authority governing VBSS, and necessarily serves as the point of departure for any study on ship boarding.

Vessels on the high seas are subject to the norm of exclusive flag state jurisdiction, unless there is an exception or intervening rule. This means that the primary responsibility for the maintenance of security and law enforcement on ships in international waters falls on the flag state. States may provide permission or consent to outsource their

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17. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* 3-7 (W. Michael Reisman & Andrew R. Willard eds., 1988).

18. Robert Axelrod, *An Evolutionary Approach to Norms*, 80 *AM. POL. SCI. REV.* 1095, 1097 (1986).

19. Gary Goertz & Paul F. Diehl, *Toward a Theory of International Norms: Some Conceptual and Measurement Issues*, 36 *J. OF CONFLICT RESOL.* 634, 639 (1992).

responsibility, which may include negotiation of bilateral or multilateral agreements with other nations, but the flag state possesses authority as a matter of sovereignty. Commanders operating at sea may seek consent to board a vessel from the flag state on an ad hoc basis as well, either by requesting approval from the national-level authorities of the flag state, or by seeking the consent of the master of the vessel. Coordinating VBSS of a flag state's merchant ships is an exercise, rather than a diminution, of flag state sovereignty. Permission to board may be narrowly circumscribed, however, and does not necessarily entail consent to inspect, search or seize the vessel. Flag states cooperate to leverage the capabilities of other states to enforce international standards of safety and security. Nowhere is collaboration so ingrained than in counter-drug operations at sea.

### 1. Counter-Drug Cooperation

Cocaine is the second most common illegal drug entering the United States. The illicit cocaine market funnels vast sums of cash to criminal gangs throughout the Americas, including Mexican drug cartels and the terrorist organization, the Revolutionary Armed Forces of Columbia. Illegal drugs travel by sea from the Andean Ridge to isolated beaches along the coasts of Mexico, where the contraband is loaded onto trucks and driven across the Southwest border.

Treaties to suppress international drug trafficking constitute some of the most mature maritime treaties designed to promote maritime security cooperation. For example, 17(3)-(4) and (7)-(11) of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("Vienna Convention"), urges states to cooperate and provide consent in the boarding of their ships engaged in international drug trafficking.<sup>20</sup> Article 108 of UNCLOS reflects the duty of all states to cooperate in the suppression of illicit drug trafficking by ships on the high seas. These rules apply through extension of Article 58(2) to the EEZ. The member states of the International Maritime Organization (IMO) have developed concrete regimes that reflect the norms to suppress maritime drug trafficking through 1990 amendments to the 1965 Convention on Facilitation of International Maritime Traffic

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20. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17, Dec. 20, 1988, 1582 U.N.T.S. 164, 28 I.L.M. 493; see Eur. Consult. Ass., *Agreement by Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Doc. No. 156 (1995).

(FAL).<sup>21</sup> The guidance and industry practices adopted by FAL are aimed at enhancing port state security. More recently, the IMO Assembly adopted guidelines for the suppression of illicit drug trafficking.<sup>22</sup>

Shiprider agreements, which may be either bilateral or multilateral arrangements, permit marine law enforcement forces of one state to embark in the patrol vessel of another state. Shiprider agreements may be used in a variety of contexts, including fisheries enforcement, marine environmental protection, countering illegal migration and human smuggling, and disrupting international drug trafficking. The agreements serve as a force multiplier and create a synergistic link among flag, port, coastal states, and interdicting states. A law enforcement official riding on a foreign warship may quickly authorize a foreign boarding party to inspect a suspicious vessel flying the same flag as the shiprider. The shiprider agreement between the United States and Trinidad and Tobago, for example, even allows U.S. law to be enforced against a ship engaged in drug trafficking that is registered in Trinidad and Tobago.<sup>23</sup>

The United States has twenty-seven such agreements, which link the counter-drug efforts of the nation to Caribbean and Latin American states, as well as the United Kingdom. The agreement between the United States and the United Kingdom provides a non-reciprocal right of ship boarding,<sup>24</sup> whereas the agreement between Spain and Italy grants standing authority for each to conduct visit and search of the other's vessels.<sup>25</sup> Typically, bilateral agreements establish a streamlined procedure for a nation seeking to board the vessel of another state to obtain consent from the flag state on a case-by-case basis. Likewise, states may negotiate multilateral shiprider agreements, such as the 2003 Caribbean Regional Agreement Concerning Co-operation in Suppressing

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21. See, e.g., IMO, *Prevention of Drug Smuggling on Ships Engaged in International Traffic: Interim Guidelines for Use by Shipowners, Seafarers and Others Closely Involved with the Operation of Ships*, IMO DOC. FAL.5/Circ.1 (Feb. 5, 1997); see also, IMO, *Drug Trafficking and Drug Abuse: Guidelines for Shipowners and Masters on Prevention, Detection and Recognition*, IMO DOC. FAL.5/Circ.9 (Jan. 25, 1996).

22. IMO, *Guidelines for the Prevention and Suppression of the Smuggling of Drugs, Psychotropic Substances and Precursor Chemicals on Ships Engaged in International Maritime Traffic*, IMO Assemb. Res. A. 872 (20) (Nov. 27, 1997). The Guidelines attached to the resolution replaced the interim Guidelines adopted in IMO FAL.5/Circ. 1/Rev.1 (Feb. 5, 1997).

23. Agreement Concerning Maritime Counter-Drug Operation, ¶ 6, Mar. 4, 1996, T.I.A.S. 12732.

24. Agreement Concerning Narcotic Drugs: Interdiction of Vessels, U.S.-U.K., ¶ 1, Nov. 13, 1981, T.I.A.S. 10296.

25. Treaty Between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea, Spain-It., art. 5, Mar. 23, 1990, 1776 U.N.T.S. 242.

Illicity Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area.<sup>26</sup>

## 2. Proliferation Security Initiative

One million tons of cocaine flow into the United States every year, and the astonishing quantity of illegal drugs opens the door to the prospect of smuggling even more malicious cargo—including WMDs—into the United States. Perhaps the most pernicious threat from the sea is the surreptitious introduction of terrorists or WMDs via the international marine transportation system. The reality of this threat was exposed by the transit of a small, shadowy North Korean freighter, the MV *So San*.

In October 2002, less than one year after the terrorist attacks of September 11, 2001, Spanish commandos conducted a fast-rope rappel onto the decks of the freighter MV *So San*, which was underway in the Indian Ocean. The saga of the MV *So San* began when North Korea secretly loaded the vessel with Scud missiles, missile fuel, high explosive warheads, and other missile components; the ship set sail from Asia bound for the Middle East. Operating on British and American intelligence, the Spanish frigates *Patino* and *Navarra* approached and queried the ship. Steaming 600 miles off the Horn of Africa, *So San* provided inconsistent responses to warship queries, and ultimately the vessel claimed Cambodian registry, something Phnom Penh was unable to verify. Consequently, the government of Cambodia granted conditional consent for forces to board the vessel, assuming the ship was in fact registered in Cambodia.

Once on board the ship, the marines discovered the Scud missiles and associated components hidden under a cargo of dry cement. For several days, American, Spanish, and British authorities were uncertain of the destination of the cargo, until the government of Yemen stepped forward to claim the missiles.<sup>27</sup> During the *So San* crisis, I served as a legal adviser on a major Pentagon staff, which searched in vain for a legal justification that would permit the nations involved to detain the illicit cargo. Upon assurances from officials in the Yemeni capital of Sana'a that the missiles would be properly secured and not transferred to a third country, Spain, the United Kingdom and the United States

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26. J. Ashley Roach, *Initiatives to Enhance Maritime Security*, 28 MARINE POL'Y 41, 64 (2004) (describing ship boarding provisions).

27. *Use of Force and Arms Control*, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 18, at 1052-57, available at <http://www.state.gov/documents/organization/139638.pdf>.

released the cargo. There was no lawful basis to detain the ship or confiscate its cargo, but the incident generated a great deal of interest inside the White House to develop a more effective international dragnet to prevent the proliferation of WMDs. The effect of the incident throughout the U.S. maritime security policy community was palpable; immediately work began tightening the rules of nonproliferation and counterterrorism.

Just seven months after the *So San* incident, President George W. Bush unveiled the Proliferation Security Initiative (PSI). Standing in solidarity with eleven core partner nations meeting in Krakow, Poland, the United States proclaimed the first comprehensive effort to take stock of the range of instruments and authorities to promote global, cooperative action against the spread of WMDs.<sup>28</sup> PSI is an activity, not an organization or institution, and the only requirement to participate is acceptance and ability to adhere to the Interdiction Principles for the Proliferation Security Initiative, which were subsequently reached in September 2003.<sup>29</sup>

Maritime interdiction is a key component of PSI, which promotes a cooperative network for maritime interdiction of vessels reasonably suspected of transporting cargoes of WMDs, their delivery systems, or related materials. PSI seeks to establish a more dynamic, creative, and proactive approach to preventing proliferation to or from states and non-state actors. Many officials in the U.S. government described PSI to Sharon Squassoni of the Congressional Research Service (CRS) this way: PSI relies on the “broken taillight scenario,” whereby officials from a range of cooperating states look for “all available options to stop a ship suspected of transporting WMD[s].”<sup>30</sup> But no legal corners are cut. One of the early participants in PSI emphasizes that it is grounded in compliance with national and international law and frameworks, including respect for exclusive flag state jurisdiction.<sup>31</sup> Participation in PSI represents political will for nations to “seriously consider providing consent under appropriate circumstances to the boarding and searching

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28. See *Proliferation Security Initiative Participants*, U.S. DEP’T OF STATE (last updated Sept. 10, 2010), [www.state.gov/t/isn/c27732.htm](http://www.state.gov/t/isn/c27732.htm).

29. *The Interdiction Principles for the Proliferation Security Initiative*, U.S. DEP’T OF STATE (last updated Sept. 4, 2003), <http://www.state.gov/t/isn/c27726.htm>.

30. SHARON SQUASSONI, CONG. RESEARCH SERV., RS 21881, PROLIFERATION SECURITY INITIATIVE 4 (2006), available at <http://www.fas.org/sgp/crs/nuke/RS21881.pdf>.

31. J. Ashley Roach, *Proliferation Security Initiative (PSI): Countering Proliferation by Sea*, in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 351, 353 (Myron H. Nordquist, John Norton Moore & Kuen-chen Fu, eds., 2006).

of its own flag vessels by other States and to the seizure of such WMD-related cargoes in such vessels that may be identified by such States.”<sup>32</sup>

Only months after the initiative was launched, British and American intelligence communities discovered that the German-registered vessel, BBC *China*, was transporting uranium enrichment equipment from Malaysia to Libya, via Dubai. With the consent of Germany, the vessel was diverted to the Italian port of Taranto, and Italian authorities searched the vessel and seized the centrifuge materials, which were not listed on the cargo manifest. Two months later, Libya announced that it was abandoning its ambition to develop a uranium enrichment capability.<sup>33</sup> The BBC *China* interdiction has been followed by additional PSI successes that, for political reasons, have not been widely publicized.<sup>34</sup> These successful efforts include disrupting Iranian attempts to procure goods for its nuclear program, and preventing a country in another region of the world from receiving equipment for a ballistic missile program.<sup>35</sup>

PSI is now supported by more than ninety nations, and has been endorsed by the North Atlantic Treaty Organization (NATO).<sup>36</sup> In 1994, NATO expressed strong support for counter-proliferation efforts.<sup>37</sup> A July 20, 2007 proposal by the NATO Senior Defence Group on Proliferation subsequently was endorsed by the North Atlantic Council on September 26, 2007. NATO support for PSI was reaffirmed.<sup>38</sup> The initiative also was endorsed by the countries of the G8 and the former U.N. Secretary-General.<sup>39</sup>

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32. CHAIRMAN JOINT CHIEFS OF STAFF, INSTRUCTION 3520.02A, PROLIFERATION SECURITY INITIATIVE (PSI) ACTIVITY PROGRAM (2007).

33. Robin Wright, *Ship Incident May Have Swayed Libya*, WASH. POST, Jan. 1, 2004 at A18.

34. Robert Joseph, Remarks at the Institute of Defense and Strategic Studies in Singapore 5 (Aug. 15, 2005), available at [http://www.nti.org/research/official\\_docs/dos/dos081505.pdf](http://www.nti.org/research/official_docs/dos/dos081505.pdf).

35. *Id.*

36. *Proliferation Security Initiative Participants*, *supra* note 28.

37. North Atlantic Treaty Organization [NATO], *Alliance Policy Framework on Proliferation of Weapons of Mass Destruction, Ministerial Meeting of the North Atlantic Council, June 9-10, 1994*, NATO Press Communiqué M-NAC-1(94)45 (June 9, 1994), available at <http://www.nato.int/docu/comm/49-95/c940609a.htm>.

38. Press Release, NATO, Istanbul Summit Communiqué (June 28, 2004), available at <http://www.nato.int/docu/pr/2004/p04-096e.htm>.

39. Pierre Claude Nolin, NATO Parliamentary Assembly, *Nuclear Weapons Proliferation*, at 5, NATO Doc. 168 STC 04 E Rev. 1 (Nov. 2004); U.N. Secretary-General, *A More Secure World: Our Shared Responsibility – Report of the High-Level Panel on Threats, Challenges, and Change*, ¶ 132, U.N. Doc. A/59/565 (Dec. 1, 2004).

Eleven states have signed PSI ship boarding agreements with the United States.<sup>40</sup> As a member of the U.S. delegation for negotiations for several of these treaties, I would suggest that it is important to understand that the agreements typically do not constitute blanket authority for one state to automatically board the ships of a partner nation. Although there are four primary models among the nine agreements, in general the treaties establish a mechanism for flag state expedited review of a request by one party to board a ship registered by the other party. The agreements may contain a provision for presumed consent if a request to board a ship of one party, however, is not denied by the flag state within a few hours.

### 3. Master's Consent

Both the counterdrug shiprider agreements and the PSI ship boarding agreements serve as proxies for or to facilitate flag state consent of a request to board a suspicious vessel. The United States also accepts that the master of a vessel can provide authorization for boarding his ship. Authority for boarding based solely on the basis of the master's consent is derived from the master's plenary authority over the ship, and reflects the custom and state practice of flag states and their masters. Masters are endowed with plenary authority over their ship while it is in international waters, and may allow anyone to come on board the vessel as his guest, including foreign law enforcement officials and military forces. Such invited vessel boardings, if not coerced by the warship, are consensual in nature. There is no codified rule of international law expressly authorizing the master of a vessel to grant consent to board his vessel, but longstanding maritime custom supports the practice. The United States and Coalition partners used permission from vessel masters to conduct boardings of foreign-flagged merchant ships throughout the Persian Gulf in the aftermath of the first Gulf War and the attacks of September 11, 2001.

Some nations do not recognize a master's authority to assent to a consensual boarding. The voluntary consent of the master permits the boarding, but it does not allow the assertion of law enforcement authority. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*. The scope and duration of

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40. See *Ship Boarding Agreements*, U.S. DEP'T OF STATE (Nov. 29, 2010, 8:59 PM), <http://www.state.gov/t/isn/c27733.htm> (listing countries participating in ship boarding agreements; the author participated in negotiating the agreements with Bahamas and Malta).

a consensual boarding may be subject to conditions imposed by the master and may be terminated by the master at his discretion. Nevertheless, such boardings have utility in allowing rapid verification of the legitimacy of a vessel's voyage by obtaining or confirming vessel documents, cargo, and navigation records without undue delay to the boarded vessel. In cases where the vessel's flag state is a party to a bilateral/multilateral agreement, including a ship boarding provision, and there exist reasonable grounds to suspect that the vessel is engaged in the illicit activity that is the subject of the agreement, boarding shall be conducted under the terms of that agreement vice seeking the master's consent.

#### 4. Illegal, Unreported, and Unregulated Fishing

Under the "Straddling Stocks" or "Fish Stocks" Agreement, states may, in certain circumstances, board foreign-flagged vessels in order to prevent over-fishing.<sup>41</sup> Furthermore, parties that are also members of sub-regional fisheries agreements or Regional Fisheries Management Organizations may board foreign-flagged vessels and enforce sub-regional or regional agreements even if the vessel is registered in a state that is not a party to such agreement, so long as the ship is registered in a state that is party to the overall Fish Stocks Agreement.<sup>42</sup> During fisheries enforcement interdictions, the boarding party should "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors" or in situations involving opposed boarding, in which "the inspectors are obstructed in the execution of their duties."<sup>43</sup> In all cases the use of force must be reasonable under the circumstances. Beyond this exception, however, the flag state exercises general exclusive flag state jurisdiction over fishing vessels flying its flag, subject to the rights of the coastal state to enforce its EEZ.<sup>44</sup>

#### *B. Port State Control Measures*

Often enforcement and compliance with international shipping regulations is most effectively accomplished in port, with collaboration

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41. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, art. 20, *opened for signature* Dec. 4, 1995, 2167 U.N.T.S. 3, 34 I.L.M. 1542.

42. *Id.* art. 21.

43. *Id.* art. 22(1)(f).

44. *Id.* art. 19.

of all interested parties, and with the flag state in a central role. In addition to flag state consent under Articles 92 and 94 and port state control measures under Article 25 of UNCLOS,<sup>45</sup> there are ample authorities for boarding vessels either at sea or at the pier. All States exercise sovereignty within their ports, roadsteads, and inland waters and may enforce national laws over foreign commercial ships in those areas. Under international law, a coastal state may impose conditions on ships entering its ports or internal waters, including requirements for vessel prior boarding and inspection before entering port. A “port” consists of the permanent harborworks that are an integral part of the harbor system forming part of the coast.<sup>46</sup> In the United States, the Coast Guard uses extensive port state control measures of the Maritime Transportation Security Act (MTSA) of 2002 as an important element of maritime homeland security, as well as for enforcement of U.S. environmental laws.<sup>47</sup> A roadstead is a port extension facility used in loading, unloading, and anchoring of ships within the territorial sea.<sup>48</sup> Such provisions should be applied on a non-discriminatory basis.

Any ship, including a warship, may be denied entry into port by a port state for virtually any reason, although there is an exception for force majeure. Boarding and inspection may occur at any time, even prior to port entry such as when the vessel is in territorial seas, the EEZ, or even on the high seas. Foreign warships and other ships entitled to sovereign immunity must comply with the laws and regulations of the coastal state, but may not be boarded or inspected.

### C. Coastal State Authority

The sovereignty of a coastal state extends beyond its land territory and internal waters “to an adjacent belt of sea, described as the territorial sea.”<sup>49</sup> Generally, the ships of all nations are entitled to conduct “innocent passage” in the territorial sea, waters extending seaward from the shoreline to 12 nm, of a coastal state. International law allows coastal states to adopt laws and regulations relating to innocent passage through

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45. UNCLOS, *supra* note 5, art. 25, 92, 94.

46. *Id.* art. 11.

47. *See, e.g.*, Maritime Transportation Security Act, Pub. L. No. 107-295, § 104, 116 Stat. 2064, 2085 (2002) (amending the definition of territorial waters for purposes of enforcement of maritime security provisions to include “all waters of the territorial sea of the United States as described in Presidential Proclamation 5928 of December 27, 1988”).

48. *Id.* art. 12.

49. UNCLOS, *supra* note 5, art. 2(1).

the territorial sea, but such laws and regulations shall not apply to the design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards and are applied in a non-discriminatory manner.<sup>50</sup> The United States strictly interprets Articles 19 and 25 as inclusive of all activities that make passage non-innocent.<sup>51</sup> The American delegate to the Third U.N. Conference on the Law of the Sea reiterated this long-standing position during the negotiations of the UNCLOS:<sup>52</sup>

The United States understands, with respect to the right of innocent passage under UNCLOS, that—

- (A) all ships, including warships, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, enjoy the right of innocent passage;
- (B) article 19(2) contains an exhaustive list of activities that render passage non-innocent;
- (C) any determination of non-innocence of passage by a ship must be made on the basis of acts it commits while in the territorial sea, and not on the basis of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose; and
- (D) the Convention does not authorize a coastal State to condition the exercise of the right of innocent passage by any ships, including warships, on the giving of prior notification to or the receipt of prior permission from the coastal State.<sup>53</sup>

The list of activities in Article 19 that are inconsistent with the right of innocent passage are narrowly construed by the U.S. government, both in cases involving foreign-flagged vessels operating within the United States' territorial sea and in cases of U.S. vessels transiting in other nations' territorial seas. This understanding of Article 19 was strengthened by the complementary and mutual agreement of the United States and the U.S.S.R. in Paragraphs 2 and 3 of the "Jackson Hole

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50. *Id.* art. 24(1).

51. Third United Nations Conference on the Law of the Sea, Montego Bay, Jam., *Note by the Secretariat*, 243-4, U.N. Doc. A/CONF. 62/WS/37 (Dec. 10 1982), available at [http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol\\_XVII/a\\_conf-62\\_ws\\_37%20and%20add-1%20and%202.pdf](http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVII/a_conf-62_ws_37%20and%20add-1%20and%202.pdf).

52. *Id.*

53. *Id.*

Agreement.”<sup>54</sup> Meeting at Jackson Hole, Wyoming, in September 1989, the two superpowers agreed that Article 19 contains the “exhaustive list” of activities that may be considered non-innocent.<sup>55</sup> Innocent passage may not be conditioned by notification or consent by the coastal state.<sup>56</sup> Paragraph 2 of the Jackson Hole Agreement states that, “[a]ll ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.”<sup>57</sup>

Coastal states, however, may take the necessary steps to prevent passage in its territorial sea that is “not innocent,”<sup>58</sup> meaning that the transit is “prejudicial to the peace, good order or security of the coastal State.”<sup>59</sup> Coastal states also may temporarily suspend innocent passage in localized areas if doing so is “essential for the protection of its security. . . .”<sup>60</sup>

The Espionage Act of 1917,<sup>61</sup> as amended by the Magnuson Act of 1950,<sup>62</sup> authorized the President to institute measures and promulgate rules and regulations necessary to govern the movement and anchorage of foreign-flag vessels in the territorial waters of the United States and to inspect such vessels at any time. The MTSA amended the definition of territorial waters for purposes of these provisions to include “all waters of the territorial sea of the United States.”<sup>63</sup> This had the effect of extending the territorial sea for purposes of the jurisdiction of the 1917 Espionage Act to 12 NM.<sup>64</sup> The law authorized measures and regulations to safeguard against the destruction, loss, or injury of vessels, harbors, ports, and waterfront facilities subject to the jurisdiction of the United States due to sabotage or subversive acts, accidents, or other similar causes.<sup>65</sup> These measures and regulations are authorized whenever the

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54. Joint Statement With Attached Uniform Interpretation of Rules of International Law Governing Innocent Passage, U.S.-U.S.S.R., ¶¶ 2-3, Sept. 23, 1989, 28 I.L.M. 1444 [hereinafter Jackson Hole Agreement].

55. *Id.* ¶ 3.

56. *Id.* ¶ 2.

57. *Id.*

58. UNCLOS, *supra* note 5, art. 25(1).

59. *Id.* art. 19(1).

60. *Id.* art. 25(3).

61. Espionage Act of 1917, ch. 30, 40 Stat. 220 (1917).

62. Magnuson Act of 1950, ch. 656, 64 Stat. 427-28 (1950).

63. Maritime Transportation Security Act § 104 (a)(2).

64. Presidential Proclamation No. 5928: Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Dec. 27, 1988).

65. 50 U.S.C.A. § 191 (Lexis Nexis 2003).

President determines that war or “disturbances of international relations” endangers the security of the United States.<sup>66</sup>

In 1950, President Truman found that the security of the United States was endangered and directed that the provisions of the Espionage Act and the Magnuson Act be implemented. He also prescribed certain port security regulations to be enforced by the Coast Guard.<sup>67</sup> The finding of endangerment to the security of the United States has remained in effect continuously since its issuance and has taken on new relevance in light of the focus on port and vessel security after the attacks of September 11, 2001.<sup>68</sup> The Captain of the Port or District Commander may declare a security zone, which is an area of land, water, or land and water designated to safeguard either internal waters “or other waters of the United States, or to secure the observance of the rights and obligations of the United States.”<sup>69</sup> A security zone may be declared in order to protect vessels, ports, or harbors in the United States and territory and water subject to the jurisdiction of the United States.<sup>70</sup> The Captain of the Port has plenary police powers over persons and vessels in a security zone for the purpose of safeguarding U.S. maritime interests. Vessels may not “enter or remain in a security zone without the permission of the Captain of the Port,” and “shall obey any direction or order of the Captain of the Port.”<sup>71</sup> The Captain of the Port also has authority to seize any vessel in the security zone and “remove any person, vessel, article, or thing from the security zone.”<sup>72</sup>

Ordinarily, the coastal state may not exercise criminal jurisdiction over vessels conducting innocent passage.<sup>73</sup> In certain cases, however, the coastal state has authority to assert criminal jurisdiction on board a foreign ship by conducting investigations, arresting persons, and temporarily detaining the vessel involved, but only in certain circumstances, such as if the “consequences of the crime extend to the coastal State.”<sup>74</sup> The coastal state may also assert criminal jurisdiction in connection with a crime that is “of a kind to disturb the peace of the country or the good order of the territorial sea,” or if the assertion of

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66. *Id.*

67. Exec. Order No. 10,173, 15 Fed. Reg. 7005 (Oct. 18, 1950).

68. Pres. Notice, 67 Fed. Reg. 9387 (Feb. 26, 2002) (continuing emergency authority).

69. 33 C.F.R. § 165.30(a) (2009).

70. *Id.* § 165.30(b).

71. *Id.* § 165.33(a), (b).

72. *Id.* § 165.33(c), (d).

73. UNCLOS, *supra* note 5, art. 27(1).

74. *Id.* art. 27(1)(a).

jurisdiction is needed to suppress narcotics trafficking.<sup>75</sup> Coastal states also may leverage the full panoply of legal rationale for boarding available to all states throughout the high seas or EEZs, such as enforcement of U.N. Security Council resolutions within its territorial sea.

For example, U.N. Security Council Resolution 1540 of 2004 determined that, “proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.”<sup>76</sup> A coastal state would be entitled under Resolution 1540 to board a foreign-flagged ship claiming to exercise innocent passage in its territorial sea because transporting weapons or materials in contravention of the Security Council mandate is both inconsistent with the right of innocent passage and is recognized as a threat to the peace and security of the coastal state. The coastal state would therefore be entitled to take all necessary measures in accordance with Resolution 1540, including the range of measures that constitute VBSS of the vessel and its cargo. The coastal state also is entitled to prescribe and enforce customs laws as well as fiscal, immigration and sanitary measures throughout the contiguous zone, which extends up to 24 NM from the shoreline.<sup>77</sup> “Sanitary” measures encompass preventive health and quarantine measures, but the term does not constitute a general provision for protection of the marine environment.

### 1. Coastal State EEZ Enforcement

The exercise of civil fishing enforcement functions by the coastal state in the EEZ is quite robust, as demonstrated by the *Monte Confurco* case (*Seychelles v. France*), which was decided by the International Tribunal for the Law of the Sea (ITLOS) in 2000.<sup>78</sup> The ITLOS determined that a fishing vessel found with fish in its hold, transiting the EEZ of a coastal state without the consent of that country, may be presumed to have caught the fish in the coastal state’s EEZ in contravention of coastal state law.<sup>79</sup> In that case, the fish were subject to seizure and the fishing vessel therefore had an interest—if not an obligation—to provide prior notification of passage to the coastal state in

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75. *Id.* art. 27(1)(b), (d).

76. S.C. Res. 1540, para. 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

77. UNCLOS, *supra* note 5, art. 33(1)-(2).

78. *Monte Confurco (Sey. v. Fr.)*, 125 I.L.R. 220 (Int’l Trib. L. of the Sea 2000), available at [http://www.itlos.org/cgi-bin/cases/case\\_detail.pl?id=5&lang=en](http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=5&lang=en).

79. *Id.* ¶ 87.

order to avoid having its cargo seized.<sup>80</sup> The *Monte Confurco* was flying the flag of Seychelles, and had been properly licensed to fish in international waters.<sup>81</sup> The Monteco Shipping Corporation, a company also registered in Seychelles, owned the ship.<sup>82</sup> The *Monte Confurco* left Port Louis, Mauritius, on August 27, 2000, “to engage in long-line fishing in the Southern seas.”<sup>83</sup> On November 8, 2000, a boarding party from the French surveillance frigate *Floréal* went on board the *Monte Confurco* in the EEZ of the Kerguelen Islands, which are located in the French Southern and Antarctic territory midway among Africa, Antarctica, and Australia.<sup>84</sup> The Captain of the *Floréal* issued a procès-verbal of violation (*procès-verbal d’infraction*) No. 1/00, against the Master of the *Monte Confurco* “for having [f]ailed to announce his presence and the quantity of fish carried aboard to the Head of the District of the Kerguelen Islands,” for having fished without prior authorization, and also for having tried to evade investigation by marine fisheries agents.<sup>85</sup>

The next day the Captain drew up another procès-verbal, No. 2/00, apprehending the fish catch in the hold of the *Monte Confurco*, as well as seizing “navigation and communication equipment, computer equipment, and documents of the vessel and of the crew.”<sup>86</sup> The French enforcement vessel observed a number of indicators that suggested the *Monte Confurco* had been fishing illegally in the EEZ.<sup>87</sup> The *Monte Confurco* had 158 tons of Patagonian toothfish on board, valued at about \$1.3 million.<sup>88</sup> The authorities discovered long-lines drifting in the water identical to, and whose numbers formed logical sequences with, the *Monte Confurco*’s lines.<sup>89</sup> Additionally, the authorities observed defrosted bait that appeared to have been jettisoned into the sea, while noting the absence of other fishing vessels in the vicinity at that time.<sup>90</sup> Small frozen fish and fishhooks were also found onboard the fishing vessel toward the rear of the deck amidships and there was evidence that

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80. *Id.*

81. *Id.* ¶ 27.

82. *Id.*

83. *Id.* ¶ 28.

84. *Monte Confurco*, 125 I.L.R. 220, ¶ 29.

85. *Id.* ¶ 30.

86. *Id.* ¶ 31.

87. *Id.* ¶¶ 33-34.

88. *Id.* ¶ 33.

89. *Id.*

90. *Monte Confurco*, 125 I.L.R. 220, ¶ 33.

the on-board factory had recently been cleaned and the ship had quantities of fresh fish blood and waste.<sup>91</sup>

The vessel was arrested and it was determined that the fish would be impounded and sold and the proceeds credited to the treasury “until court orders were obtained in respect of the proceeds.”<sup>92</sup> The court of first instance at Saint-Paul noted in its November 22, 2000, order that the *Monte Confurco* entered the Kerguelen Islands’ EEZ “without prior authorization and without advising the head of a district of the nearest archipelago of its presence.”<sup>93</sup> The *Monte Confurco* failed to declare the tonnage of fish carried on board, which also violated French regulations.<sup>94</sup> The *Monte Confurco*’s unannounced presence in the Kerguelen Islands EEZ while in possession of a certain quantity of toothfish that it failed to declare “raised the ‘presumption’ that the whole catch was unlawfully fished” in the Kerguelen Islands’ EEZ.<sup>95</sup> The ship claimed that it had failed to notify French authorities because the facsimile machine on the ship was not working properly,<sup>96</sup> but France argued that notification could have been made by satellite telephone.<sup>97</sup>

During legal proceedings, France called as an expert Professor Duhamel, an ichthyologist, to testify as to the fish stock in the area.<sup>98</sup> The expert believed that the toothfish in the hold could not have been caught at the location indicated in the ship’s log, as the water in that area was too deep.<sup>99</sup> ITLOS found by a vote of nineteen to one that the allegations made by France were well founded.<sup>100</sup> ITLOS also ruled that “France [should] promptly release the *Monte Confurco* and its Master upon the posting of a bond or other security,” the amount of which was set by ITLOS.<sup>101</sup> In making the finding, ITLOS ruled that all of the toothfish probably could not have been caught at the location claimed by Seychelles, which lay outside of France’s EEZ.<sup>102</sup> The coastal state is entitled to wide latitude in enforcing legitimate resource-related interests throughout the EEZ. But the EEZ is not a general security zone or

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91. *Id.* ¶ 34.

92. *Id.*

93. *Id.* ¶ 37.

94. *Id.*

95. *Id.*

96. *Monte Confurco*, 125 I.L.R. 220, ¶ 48.

97. *Id.* ¶ 53.

98. *Id.* ¶ 54.

99. *Id.*

100. *Id.* ¶ 96.

101. *Id.* ¶ 96(5).

102. *Monte Confurco*, 125 I.L.R. 220, ¶ 88.

customs enforcement zone—it cannot be territorialized. For example, in the 1999 case *M/V Saiga No. 2*, ITLOS rejected the suggestion that coastal states could exercise customs authority in the EEZ.<sup>103</sup>

#### *D. Right of Approach and Visit*

The right of approach and visit applies throughout the high seas,<sup>104</sup> and through Article 58 of UNCLOS, throughout the EEZ of all coastal states.<sup>105</sup> That is, the rules governing approach and visit apply for all warships outside the territorial sea of foreign coastal states. Approach and visit is another long-standing norm of maritime practice that is codified in the high seas regime of UNCLOS.<sup>106</sup> Warships of all nations may “approach” international merchant shipping transiting beyond the territorial sea, and inquire as to the nature of the vessel’s voyage, crew, cargo manifest, last port, next port or previous voyages, flag state registry, ownership, and other questions to elicit information about the ship and its purpose.<sup>107</sup> Only “warships” may exercise the right, and the term includes sovereign immune ships of the coast guard or maritime law enforcement.<sup>108</sup> Normally the exercise of the right of approach by a warship does not impose a requirement on the part of the queried vessel to respond to the queries, and a refusal to respond does not automatically trigger a right of visit on the part of the hailing ship.<sup>109</sup> But in certain circumstances, the warship may exercise a right of “visit” or boarding of the foreign-flagged merchant ship, without flag state or master’s prior consent.<sup>110</sup>

Article 110 of UNCLOS provides that as a general rule, warships of one nation are not entitled to board foreign-flagged vessels, unless authority to do so is derived from “powers conferred by treaty.”<sup>111</sup> Exceptions to this tenet of international law, however, are reflected in Article 110.<sup>112</sup> Warships are justified in boarding a foreign-flagged

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103. *M/V Saiga (No. 2)* (St. Vincent v. Guinea), 120 I.L.R. 143, ¶ 136 (Int’l Trib. L. of the Sea 1999).

104. UNCLOS, *supra* note 5, art. 110.

105. *Id.* art. 58(2).

106. *Id.* art. 110.

107. *Id.*

108. Article 110 refers to warships and other vessels “entitled to complete immunity in accordance with Articles 95 and 96.” *Id.*

109. *The Mariana-Flora*, 6 U.S. (11 WHEAT.) 1, 44 (1826).

110. UNCLOS, *supra* note 5, art. 110(1)(a)-(c).

111. *Id.*

112. *Id.*

vessel in cases in which there is a “reasonable ground” for suspecting the ship in question is engaged in maritime piracy, slave-trafficking, or unauthorized broadcast at sea.<sup>113</sup> All states may also board and inspect vessels that carry the same flag as the investigating warship, or that are “stateless,” meaning they are not legitimately registered to any state.<sup>114</sup>

Suspect vessels evidence a lack of valid nationality through a number of cues, including failure to make a claim of nationality or show a flag of registration; making contradictory claims or multiple claims of nationality; revolving or changing flags of registration, vessel name, home port, or signboards during a single journey; or making evasive, misleading, or unverifiable responses to queries of nationality. In such cases, naval vessels of any state may assimilate the ship without nationality. Vessels without nationality that are assimilated may be boarded and searched under the terms and rules of engagement set forth by the state of the boarding warship. The consent of the master is not required. Consequently, a warship may proceed to verify the flag registry of a suspected ship. This process is accomplished by dispatching a boarding team in a small boat under the command of an officer from the warship to board the suspect vessel.<sup>115</sup>

If the review of ship documents confirms the suspicions, the boarding party may conduct a more thorough inspection and examination of the ship’s papers, and a physical search of the vessel and crew. Occasionally, illicit cargo is secreted inside the bulkhead or overhead of the vessel, or built into the frame of the ship, and a destructive search may be conducted inside the vessel at sea, or through forcefully penetrating the hull, in a port location. If the suspicions prove to be unfounded, however, the owner of the vessel shall be compensated by the state of the warship for any loss or damage that may have been sustained.

In recent years, nations have exercised the right of approach and visit most often in cases concerning maritime piracy. Piracy is “any illegal act of violence, detention, or depredation committed beyond the territorial sea for private ends by crew or passengers of a private ship or aircraft against another ship, persons, or crew.”<sup>116</sup> “Private” acts refer to acts not committed by public officials for a public or state purpose. Typically, piracy involves some pecuniary interest or private political motive, such as maritime terrorism. For a violent act to meet the legal

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113. *Id.* art. 110(1)(a)-(c).

114. *Id.* art. 110(1)(d), (e).

115. *Id.* art. 110.

116. UNCLOS, *supra* note 5, art. 101.

definition of piracy, it must be committed outside of a state's territorial waters. Acts occurring inside territorial seas are classified as "armed robbery at sea," and are the responsibility of the coastal state to suppress. Thus, "armed robbery at sea" in territorial waters can, a few meters away, become "piracy."

Article 101 of UNCLOS defines piracy as consisting 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 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 the facts making it a pirate ship or aircraft;
- (c) any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).<sup>117</sup>

In sum, Articles 100-110 of UNCLOS reaffirm the duty and obligation of all states to act against piracy and maritime slave trafficking. Both crimes, as well as the crime of illegal broadcast from the sea, constitute crimes of universal jurisdiction, and all states may assert jurisdiction over those offenses. The authority is not academic. Warships from dozens of nations are involved in counter-piracy operations involving VBSS of foreign-flagged vessels in the Gulf of Aden and the Western Indian Ocean. French, Dutch, Russian, and American forces have boarded ships in order to assert jurisdiction over Somali pirates operating in international waters. For example, on September 8, 2010, U.S. Marines conducted a boarding of the *Magellan Star*, a German-owned commercial ship, which had been seized by pirates off the coast of Somalia.<sup>118</sup> The ship was retaken by elements of the Fifteenth Marine Expeditionary Unit and *USS Peleliu* Amphibious

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117. *Id.*

118. Brian Murphy, *U.S. Marines Take Back Pirate-Held Ship Off Somalia*, WASH. POST, Sept. 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/09/AR2010090901655.html>; see also U.S. Marines, *Marines Gain Control of the MV Magellan Star from Suspected Pirates*, YOUTUBE, [http://www.youtube.com/watch?v=GL\\_Z7dG66lM](http://www.youtube.com/watch?v=GL_Z7dG66lM) (last visited Sept. 25, 2010) (a U.S. Navy video of the boarding of MV *Magellan Star*).

Ready Group, operating in the Gulf of Aden. Force Reconnaissance Marines conducted the VBSS, which resulted in the successful rescue of the vessel's eleven crew members, and the capture of nine suspected pirates. The regimes underpinning this norm enforcement are mostly a product of the U.N. system—beginning with rule sets adopted by the member states of the U.N. and embodied in the U.N. Charter and the treaties negotiated at the IMO, which is a specialized agency of the U.N.

#### IV. REGIMES IN THE U.N. CHARTER AND THE INTERNATIONAL MARITIME ORGANIZATION

A regime differs from a norm in that it usually is conceived of as a complex of rules and norms. The U.N. Charter, the most comprehensive treaty in existence, captures norms, such as the right of self-defense, and places them within a regime.<sup>119</sup> Likewise, the international law of the sea reflects a handful of important and long-standing norms, which previously were discussed. The regimes embodied in UNCLOS also bring greater fidelity to the meaning of those norms in contemporary politics. UNCLOS was constructed around an integrated set of mutually supporting regimes pertaining to geophysical areas on, over, or under the oceans. A “regime” may be understood as a prevailing decision rule or rule system, or as a set of procedures that facilitate a convergence of expectations.<sup>120</sup> But a regime is more than a set of rules; it presupposes a level of institutionalization that springs from an integrated framework, which has both qualities of formality and adherence or compliance.<sup>121</sup> In UNCLOS, regimes provide the standards that establish international expectations or a sense of legal obligation. In recent decades, regimes generally have become a more important factor in international relations and international law due to their increasing number and their growing influence on state behavior.<sup>122</sup> The new regimes in UNCLOS provide the legal model of the oceans, and set down permissible activities by foreign states and distant water states on the surface of the seas, in the water column, on the seabed, and in the airspace above the water.

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119. U.N. Charter art. 2(4), 51 (as well as associated chapters and articles of the Charter).

120. Stephen D. Krasner, *Structural Causes and Regimes Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1986).

121. Richard Little, *International Regimes*, in *THE GLOBALIZATION OF WORLD POLITICS: AN INTRODUCTION TO INTERNATIONAL RELATIONS* 369, 373 (John Bayliss & Steve Smith eds., 3rd ed. 2005).

122. ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* 19 (1977).

*A. Self-Defense*

The concept of an inherent right of self-defense, although it predates the founding of the U.N. and is recognized in customary international law,<sup>123</sup> is reflected in Article 51 of the U.N. Charter: “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the U.N. until the Security Council has taken the measures necessary to maintain international peace and security.”<sup>124</sup> Thus, Article 51 recognizes the inherent right to both individual and collective self-defense. The United States independently recognizes that nations may legally conduct VBSS as an instrument of self-defense, and the action may be justified either pursuant to customary international law or Article 51 of the U.N. Charter.<sup>125</sup>

Currently, U.S. naval forces exercise the inherent right of self-defense in accordance with the Standing Rules of Engagement for U.S. Forces (SROE).<sup>126</sup> Informed by policy considerations as well as by international law, the SROE indicate that “unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstration of hostile intent.”<sup>127</sup> A “hostile act” is an “attack or other use of force against the United States, U.S. forces, or other designated persons or property,” including “vital” U.S. government property.<sup>128</sup> “Hostile intent” means the “threat of imminent use of force against the United States, U.S. forces or other designated persons or property.”<sup>129</sup> The use of force is authorized for the duration of the demonstration of hostile intent against U.S. forces or designated persons or property.

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123. See, e.g., John Bassett Moore, 2 INT’L LAW DIG. 412 (1906) (highlighting the *Caroline* case, which ruled that defensive force is permitted when the “[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation”).

124. U.N. Charter, *supra* note 119, art. 51.

125. DEP’T. OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS AND HEADQUARTERS, U.S. MARINE CORPS, DEPT. OF HOMELAND SECURITY AND U.S. COAST GUARD, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 4-4 (2007).

126. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (2005). The SROE establish U.S. policy concerning the use of force during “all military operations and contingencies” occurring during peacetime. *Id.* at 1. Classified portions of the SROE pertain to rules that apply during periods of armed conflict.

127. *Id.* at 3.

128. *Id.* at L-3.

129. *Id.*

There exists no precise metric for determining whether a threat of force is “imminent,” and a determination is made “based on an assessment of all facts and circumstances known to DOD forces at the time.”<sup>130</sup> Furthermore, “[i]mmminent does not necessarily mean immediate or instantaneous.”<sup>131</sup> The use of force under SROE is predicated on two elements—necessity and proportionality. “Necessity” for U.S. forces exists “when a hostile act occurs or when a force demonstrates hostile intent.”<sup>132</sup> “Proportional” force used in self-defense is force that is “sufficient to respond decisively,” but not exceeding the “nature, duration, and scope” of what is required for defense.<sup>133</sup> The United States and other nations apply the principle of self-defense throughout the spectrum of international politics—and the SROE provides a guide for implementing the right of self-defense for small units, such as a boarding team in a rigid hull inflatable boat, from a surface combatant warship or a national asset, such as a nuclear-powered aircraft carrier or ballistic missile submarine. Thus, the use of force in self-defense may occur at the tactical, operational, or strategic—even global—level. For example, the imposition of the maritime quarantine against Cuba in 1962 was based on the right of self-defense.<sup>134</sup> The case of the Cuban Missile Crisis quarantine illustrates that the exercise of self-defense is not limited to cases involving an “actual armed attack.” Myres S. McDougal suggests that “imminence of attack of such high degree as to preclude effective resort . . . to non-violent modalities” has “always been regarded as sufficient justification.”<sup>135</sup>

*B. Security Council Enforcement Action—Al-Qaeda,  
Iran, and North Korea*

The U.N. Security Council may authorize MIO/VBSS against the vessels of a particular state or organization under Article 41 of Chapter VII of the U.N. Charter.<sup>136</sup> Security Council resolutions adopted under

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130. *Id.*

131. *Id.*

132. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *supra* note 126, at A-4.

133. *Id.* at A-5.

134. Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 588, 597 (1963).

135. *Id.* at 597-598; *see also* MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 229-244 (1961).

136. U.N. Charter, *supra* note 119, art. 41.

Chapter VII of the U.N. Charter are binding on all nations.<sup>137</sup> Article 41 provides Security Council authority for the “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication. . . .”<sup>138</sup> The provision may be used to authorize the naval forces of member states to intercept vessels and conduct VBSS as part of the mandate to take measures necessary to “maintain or restore international peace and security.”<sup>139</sup>

The U.N. Security Council adopted Resolution 217 of November 20, 1965, for example, authorizing the United Kingdom to enforce an oil embargo against Rhodesia.<sup>140</sup> The next year, the Security Council acted again, calling on the United Kingdom to “prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia. . . .”<sup>141</sup> Resolution 221 authorized the use of force and characterized Rhodesia’s proclamation of independence as a “threat to the peace.”<sup>142</sup> The so-called “Beira Patrol” enforced economic sanctions against the apartheid regime in Rhodesia—cutting off the supply of oil from reaching the country.

The burden for enforcing the Beira Patrol fell on Britain. The Security Council action raised considerable challenges for crafting rules of engagement for VBSS, but the strong political authority of the U.N. action deterred states from supporting Rhodesia.<sup>143</sup> There never was a risk that Rhodesia’s two supporters—South Africa and Portugal—would forcibly challenge the blockade.<sup>144</sup> Since the end of the Cold War, the Security Council has acted on a handful of occasions to authorize states to conduct VBSS in order to intercept shipping. In four separate cases, the Security Council authorized the interdiction of vessels entering or leaving Iraq, the Federal Republic of Yugoslavia, Haiti, and Sierra Leone.

After the Iraqi invasion of Kuwait in August 1990, U.N. Security Council Resolution 661 imposed a general embargo on all trade with Iraq or Kuwait as a means of inducing Iraqi compliance with U.N. Security Council Resolution 660, requiring the withdrawal of Iraqi military forces

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137. *Id.* art. 48.

138. *Id.* art. 41.

139. *Id.* art. 39.

140. S.C. Res. 217, ¶ 9, U.N. Doc. S/Res/217 (Nov. 20, 1965).

141. S.C. Res. 221, ¶ 5, U.N. Doc. S/Res/221 (Apr. 9, 1966).

142. *Id.* ¶ 1; S.C. Res. 232, ¶ 1, U.N. SCOR, 21st Year (Dec. 16, 1966).

143. D.P. O’CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 174 (1975).

144. See JAMES CABLE, *GUNBOAT DIPLOMACY 1919-1979* 126 (2nd ed. 1981); J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 *BRIT. Y.B. INT’L L.* 103, 109 (1965-66).

from Kuwait.<sup>145</sup> Operating under the Chapter VII authority, a large coalition of states used force against Iraq in response to Baghdad's August 2, 1990, invasion of neighboring Kuwait. Security Council Resolution 665 imposed a blockade on Iraq on August 25, 1990, in order to enforce Resolution 661.<sup>146</sup> Resolution 665 also provided authority for states to "halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations," using authority under Chapter VII of the Charter.<sup>147</sup> During the conflict, coalition naval forces conducted VBSS against vessels bound in and out of Iraq, diverting numerous ships and seizing cargo that violated U.N. sanctions. It is not clear whether these activities constituted a separate belligerent right of visit and search under the law of armed conflict, but my view is that they did not. Instead, the member states of the U.N. formed the coalition in accordance with Security Council resolutions that authorized measures on land and at sea in order to enforce an embargo against Iraq.

During the mid-1990s, the Security Council authorized additional MIO missions authorizing visit and search of ships to enforce sanctions against Yugoslavia (both the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia [Serbia-Montenegro]).<sup>148</sup> The Security Council also authorized visit and search of vessels inbound for

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145. S.C. Res. 661, ¶ 3, U.N. Doc S/RES/0661 (Aug. 6, 1990); S.C. Res. 660, ¶ 2, U.N. Doc S/RES/0660 (Aug. 2, 1990).

146. S.C. Res. 665, ¶ 1, U.N. Doc S/RES/0665 (Aug. 25, 1990). Interestingly, Security Council Resolution 665 requested states "cooperating with the Government of Kuwait" in the blockade of Iraq to coordinate through the discarded mechanism of the Military Staff Committee, which is described in Articles 46 and 47 of the UN Charter. *Id.* ¶ 4; U.N. Charter, *supra* note 119, art. 46, 47. The coalition did not do so, however. YORAM DINSTEN, *WAR, AGGRESSION AND SELF-DEFENCE* 306 (4th ed. 2005).

147. S.C. Res. 665, *supra* note 146, ¶ 1; *see also* S.C. Res. 660, *supra* note 145 ("Security Council condemns Iraqi invasion of Kuwait"); S.C. Res. 661, *supra* note 145 (sanctions imposed on Iraq); S.C. Res. 662, U.N. Doc. S/RES/0662 (Aug. 9, 1990) (Iraq's annexation of Kuwait was "null and void"); S.C. Res. 664, U.N. Doc. S/RES/0664 (Aug. 18, 1990) (reaffirmed earlier Security Council resolutions); S.C. Res. 665, U.N. Doc. S/RES/0665 (Aug. 25, 1990) (imposed restrictions on trade with Iraq); S.C. Res. 667, U.N. Doc. S/RES/0667 (Sep. 16, 1990) (demand release of foreign nationals abducted by Iraq); S.C. Res. 670, U.N. Doc. S/RES/0670 (Sep. 25, 1990) (air traffic restrictions); S.C. Res. 674, U.N. Doc. S/RES/0674 (Oct. 29, 1990) (collect information on Iraqi grave breaches of the law of war); S.C. Res. 677, U.N. Doc. S/RES/0677 (Nov. 28, 1990) (condemn Baghdad's attempt to alter the demography of Kuwait and destroy Kuwaiti government records).

148. S.C. Res. 787, ¶ 12, U.N. Doc. S/RES/0787 (Nov. 16, 1992); S.C. Res. 820, ¶ 17, U.N. Doc. S/RES/0820 (Apr. 17, 1993).

Haiti in 1992-93<sup>149</sup> and Sierra Leone in 1997.<sup>150</sup> In Security Council Resolution 1132 of October 8, 1997, the nations of the Economic Community of West African States were authorized to “prevent the sale or supply to Sierra Leone . . . using their flag vessels or aircraft, of petroleum and petroleum products and arms and related matériel of all types. . . .”<sup>151</sup> In Resolution 1132, the Security Council did not use the term “VBSS,” but rather the synonymous terminology for nations to “halt” inward maritime shipping and “inspect and verify” their cargoes.<sup>152</sup> More recently, in the era after the attacks of September 11, 2001, the Security Council acted to address the threat of terrorism and the transportation of WMDs at sea. Resolutions concerning Al-Qaeda, Iran, and North Korea provide the naval forces of U.N. member states with authority to conduct VBSS in specific circumstances.

#### 1. Al-Qaeda

It was clear after September 11, 2001, that in order to have relevancy in the fight against Al-Qaeda and the threat against WMDs, the Security Council would have to develop additional authorities aimed at securing the world from accelerating proliferation of WMDs. The 2003 public exposure of the nuclear proliferation network, run out of Pakistan by Dr. Abdul Qadeer Khan, provided further impetus for controlling WMDs.<sup>153</sup> Acting under Chapter VII of the U.N. Charter, in 2004 the Security Council adopted Resolution 1540, which determined that the “proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security.”<sup>154</sup> Within the context of the resolution, “means of delivery” includes “missiles, rockets, and other unmanned systems capable of delivering nuclear, chemical, or biological weapons . . . designed for such use.” The Resolution also targets “related materials,” which it defines as “materials, equipment, and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use

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149. S.C. Res. 875, ¶ 1, U.N. Doc. S/RES/0875 (Oct. 16, 1993); S.C. Res. 917, ¶ 10, U.N. Doc. S/RES/0917 (May 6, 1994).

150. S.C. Res. 1132, ¶ 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

151. *Id.* ¶ 6.

152. *Id.* ¶ 8.

153. See, e.g., William Langewiesche, *The Wrath of Khan: How A. Q. Khan Made Pakistan a Nuclear Power—and Showed That the Spread of Atomic Weapons Can't Be Stopped*, ATLANTIC MONTHLY 62-85 (Nov. 2005).

154. S.C. Res. 1540, para. 1, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

of nuclear, chemical, and biological weapons and their means of delivery.”<sup>155</sup>

Four years later, Resolution 1810 was the next comprehensive non-proliferation resolution adopted by the Security Council.<sup>156</sup> The Resolution reaffirmed Resolution 1540, and reviewed progress toward implementation of measures to prevent the proliferation WMDs and their means of delivery. The Resolution extended the mandate of the Resolution 1540 Committee for a period of three more years—until April 25, 2011.<sup>157</sup> Resolution 1540 provided sweeping legal authority for interdiction of WMDs and their delivery systems. In contrast, Resolution 1810 gauged the progress to date and sought to develop a baseline of implementation by states by developing a program for provision of technical expertise, “outreach, dialogue, assistance, and cooperation,” to enhance coordination and implementation. In addition to the overarching mandate contained in Resolutions 1540 and 1810, the Security Council has struggled to adopt targeted authorities for interdicting ships at sea that are engaged in supporting Iranian and North Korean WMD programs.

## 2. Iran

The President of the U.N. Security Council issued a statement on March 29, 2006, in which he noted concern over Iran’s decision to resume uranium enrichment and its associated nuclear program research and development, as well as Tehran’s suspension of cooperation with the International Atomic Energy Agency (IAEA) under the Non-Proliferation Treaty (NPT) Additional Protocol.<sup>158</sup> The Security Council then called on Iran to follow through with the transparency measures required by IAEA Board of Governors Resolution GOV/2006/14 concerning Iran’s implementation of the NPT.<sup>159</sup> In that Resolution, the Board of Governors deemed it necessary for Iran to take a variety of measures to resolve “outstanding questions” and build confidence.<sup>160</sup> These measures included a suspension of uranium enrichment and reprocessing activities, including research and development, in a manner

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155. *Id.*

156. S.C. Res. 1810, U.N. Doc. S/RES/1810 (Apr. 25, 2008).

157. *Id.* ¶ 6.

158. S.C. Pres. Statement 2006/15, U.N. Doc. S/PRST/2006/15 (Mar. 29, 2006).

159. *Id.*

160. Int’l Atomic Energy Agency [IAEA], *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, ¶ 1, IAEA Doc. GOV/2006/14 (Feb. 4, 2006).

that could be verified by the IAEA.<sup>161</sup> The Board of Governors also called upon Iran to ensure ratification and implementation of the full NPT Additional Protocol, and comply with the instrument pending ratification, which Tehran had signed on December 18, 2003.<sup>162</sup> Finally, the IAEA sought Iranian implementation of additional transparency measures, providing access to individuals, documentation, and laboratories inside the country.<sup>163</sup> The transparency provisions extended beyond the formal requirements of the Safeguards Agreement and the Additional Protocol, but were requested personally by the IAEA Director General.<sup>164</sup>

Four months after the adoption of Board of Governors Resolution GOV/2006/14, with Iran still intransigent, the U.N. Security Council stepped in. In July 2006, the Council adopted Resolution 1696, which reiterated the call for Iran to take the steps required by the IAEA Board of Governors in Resolution GOV/2006/14.<sup>165</sup> The operative statutory effect of Resolution 1696 was to make Iranian compliance with the previous statement of the President of the Security Council legally binding on Iran. Tehran still had not resolved “outstanding questions” concerning its nuclear activities, and the Resolution demanded that Iran suspend all uranium enrichment-related and reprocessing activities and stop further nuclear research and development.<sup>166</sup> The IAEA was authorized to verify the cessation of the prohibited activities.<sup>167</sup> Tehran dragged its feet. On December 23, 2006, the Security Council imposed sanctions on Iran through Resolution 1737.<sup>168</sup> Resolution 1737 further required all states to take measures to prevent the supply, sale, or transfer of items that could contribute to Iran’s civil or military nuclear enrichment program.<sup>169</sup>

Shortly thereafter, the Security Council adopted Resolution 1747, which also was decided under Article 41 of Chapter VII of the U.N. Charter.<sup>170</sup> Resolution 1747 demanded that Iran comply with the Board of Governors Resolution GOV/2006/14, and mandated Tehran’s action as “essential to build confidence in the exclusively peaceful purpose” of

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161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006).

166. *Id.* ¶¶ 1-2.

167. *Id.* ¶ 6.

168. S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006).

169. *Id.* ¶ 3.

170. S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

its nuclear program.<sup>171</sup> The Resolution also imposed a duty on all states to use “vigilance and restraint” towards the movement of individuals supporting Iran’s nuclear proliferation.<sup>172</sup> It further decided that Iran is not permitted to “supply, sell, or transfer” a range of prohibited weapons.<sup>173</sup>

In 2008, the Security Council imposed additional restraints through the adoption of Resolution 1803, which focused targeted trade restrictions against Tehran for refusing to suspend its uranium-enrichment and heavy-water projects.<sup>174</sup> Fourteen nations voted in favor of Resolution 1803, and although no country voted against the Resolution, Indonesia abstained.<sup>175</sup> Jakarta, mindful of its geopolitical reality as an archipelagic nation, is always wary of U.N. Security Council authority extending throughout the oceans.

The Resolution bans shipment to Iran of major weapons systems, such as armored battle tanks and warships, as well as the transfer of ballistic missile technology into the country.<sup>176</sup> The Resolution also includes annexes identifying suspected Iranian individuals and companies that should be shunned by the international community.<sup>177</sup> Nations were required to ensure their financial institutions and banks, including overseas branches, were not involved inadvertently in providing capital investment in nuclear-related activities.<sup>178</sup> Finally, the Resolution authorized states to inspect cargo of aircraft and vessels to and from Iran suspected of trafficking in proscribed materials and weapons, conditional upon flag state consent.<sup>179</sup> However, because states already may board ships based upon flag state consent, the effect of the provision is symbolic and political, rather than legally substantive.

### 3. North Korea

With the North Korean (DPRK) surprise attack on the Republic of Korea (ROK) Navy *Cheonan* offshore patrol vessel on March 27, 2010,

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171. *Id.* ¶ 1.

172. *Id.* ¶ 2.

173. *Id.* ¶ 5.

174. S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

175. Bureau of International Security and Proliferation, *U.N. Security Council Resolution 1803 on Iran’s Nuclear Program* (Apr. 4, 2008), <http://merln.ndu.edu/archivepdf/iran/State/102891.pdf>.

176. *Id.* ¶ 8.

177. *Id.* ¶ 7.

178. *Id.* ¶ 10.

179. *Id.* ¶ 11.

Security Council sanctions against DPRK have acquired new urgency. For nearly two decades, the DPRK has publicly announced its intentions to develop WMDs, including production of nuclear weapons. As a member of the NPT, North Korea had signed a full-scope safeguards agreement with the IAEA, as required by the treaty.<sup>180</sup> But in a March 12, 1993 letter to the president of the Security Council, the DPRK expressed an intention to withdraw from the NPT. On March 25, the IAEA Board of Governors passed a resolution calling on North Korea to honor its existing obligations.<sup>181</sup> Unable to verify whether DPRK nuclear material had been diverted from peaceful use, the IAEA Board of Governors found the reclusive nation in violation of its IAEA safeguards agreement on April 1, 1993.<sup>182</sup> The Security Council responded by calling on Pyongyang to reconsider its announcement and honor its commitment to non-proliferation pursuant to the treaty.<sup>183</sup>

North Korea engaged in ballistic missile tests on July 5, 2006. In condemning the missile launches, the Security Council called on all nations to prevent missiles and missile-related materials and technology from supporting the DPRK's missile and WMD programs.<sup>184</sup> Resolution 1718 of October 14, 2006 called on all states to prevent the DPRK from exporting any armaments included in a long list of conventional weapons and WMDs, as well as luxury commercial goods.<sup>185</sup> The latter proscription was designed to impinge on the exuberant lifestyle of the regime's elite, bringing pressure to bear on the decision makers. The Security Council mandate provides that nations should disrupt North Korea's nuclear weapons, ballistic missiles and transfer of weapons of mass destruction, as well as trafficking in armored battle tanks, armored combat vehicles, large caliber artillery, combat aircraft and attack helicopters, warships, missiles, and associated systems.<sup>186</sup>

On April 13, 2009, the President of the Security Council issued a statement condemning a successful April 5 missile launch by North Korea.<sup>187</sup> Six weeks later, on May 25, Pyongyang conducted its second successful nuclear test. Soon afterward, on June 12, 2009, the U.N.

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180. IAEA, *Democratic People's Republic of Korea – IAEA: Agreement for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/403 (May 1992), 33 I.L.M. 315.

181. *Id.* at 315.

182. *Id.*

183. S.C. Res. 825, ¶¶ 1-2, U.N. Doc. S/RES/825 (May 11, 1993).

184. S.C. Res. 1695, ¶¶ 3-4, U.N. Doc. S/RES/1695 (July 15, 2006).

185. S.C. Res. 1718, ¶ 8, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

186. *Id.*

187. S.C. Pres. Statement 2009/7, U.N. Doc. S/PRST/2009/7 (Apr. 13, 2009).

Security Council adopted Resolution 1874 under Article 41 of Chapter VII of the U.N. Charter.<sup>188</sup> Resolution 1874 dictated that the DPRK must strictly comply with its obligations under the previous resolutions, Resolution 1718 in particular, and abandon all nuclear activities inconsistent with either the NPT or the Safeguards Agreement.<sup>189</sup> Concerning interdiction, Resolution 1874 called upon all states to inspect, all cargo to and from the DPRK that transits their territorial ports or seas if a nation has reasonable grounds to believe cargo contains items that promote the transfer or export of North Korea's conventional or WMD programs.<sup>190</sup> If the flag state does not consent to an inspection of cargo on the high seas, the Security Council directed that the ship should proceed to a port for inspection at the pier.<sup>191</sup> The transfer of armaments from the DPRK is banned, and all imports of weapons into the DPRK are to be halted, excepting certain small arms and light weapons.<sup>192</sup> The new regime institutes an enhanced maritime cargo inspection program, but flag state consent is still required to conduct a VBSS.<sup>193</sup> Once again, the Security Council adopted peacetime enforcement measures. Because the action is not predicated on a belligerent wartime right, the Resolution is not an exercise of the belligerent right of visit and search. Instead, the provisions constitute collective measures for the maintenance or restoration of international peace and security in accordance with Article 42 of the U.N. Charter.<sup>194</sup>

Resolutions 1718 and 1874 provide an overall framework that links pre-existing international legal authorities together, binding the foundational Resolution 1540 with the NPT, the Chemical Weapons Convention and the Biological Weapons Convention, to compel North Korea and Iran to abandon their pursuit of advanced weapons.<sup>195</sup> In addition to creating legal guidance, the resolutions and associated instruments provide political cover for nations to enhance domestic counter-proliferation authorities. This umbrella of political support is

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188. S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

189. *Id.* ¶¶ 7-8.

190. *Id.* ¶¶ 11-12.

191. *Id.* ¶ 13.

192. *Id.* ¶ 10.

193. *Id.* ¶ 12.

194. U.N. Charter, *supra* note 119, art. 42.

195. *See* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (1993); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 11 I.L.M. 310 (1972).

essential for nations that are more reticent about the use of force in world politics. Tokyo, for example, relied on Resolution 1874 to develop ship boarding authority for the Japan Coast Guard to be able to interdict North Korean ships. On May 28, 2010, a coalition of lawmakers in the House of Councilors of the Diet of Japan enacted a new law authorizing the Japan Coast Guard to inspect ships suspected of carrying banned cargo bound for or leaving North Korea.<sup>196</sup> Previous efforts to pass such a law had failed because they lacked bipartisan support. The new law, however, was adopted in the wake of the Security Council Resolution 1874.

<b>A Tale of Two Security Council Counter-Proliferation Regimes<sup>197</sup></b>	
<b>UNSCR 1874 (2009)</b>	<b>UNSCR 1929 (2010)</b>
<b>[North Korea]</b>	<b>[Iran]</b>
<ul style="list-style-type: none"> <li>• Bans <u>all</u> arms transfers <i>from</i> DPRK and <u>all</u> arms <i>to</i> DPRK (except small arms &amp; light weapons)</li> <li>• Enhanced <i>maritime cargo “inspection” regime</i> (but still requires flag state consent)</li> <li>• No bunkering services</li> <li>• Asks states not to provide grants, loans, or public financial help IF it could contribute to DPRK proliferation efforts</li> <li>• Travel limitations</li> </ul>	<ul style="list-style-type: none"> <li>• Bans major weapons systems (i.e., tanks, warships, etc.) transfers and ballistic missile technology <i>to</i> Iran</li> <li>• High seas boarding based on flag state consent</li> <li>• No bunkering services</li> <li>• Prohibits Iranian foreign investment in nuclear-related activities and provision of financial services that support Iran’s nuclear program</li> <li>• Travel limitations</li> </ul>

196. *Diet Enacts Law on N. Korean Cargo Inspection*, ASSOCIATED PRESS, May 27, 2010, available at [http://www.breitbart.com/article.php?id=D9FVJ5P00&show\\_article=1](http://www.breitbart.com/article.php?id=D9FVJ5P00&show_article=1).

197. I am indebted to Capt. Raul “Pete” Pedrozo, JAGC, USN (Ret.), Professor of International Law, U.S. Naval War College, who helped me develop and organize this analysis.

#### 4. Regimes of the International Maritime Organization

The IMO is the U.N.'s specialized agency for maritime matters. With 167 member states, the organization has produced approximately fifty treaties and hundreds of codes and guidelines to enhance safety and security at sea. The work conducted at the IMO affects flag, port, and coastal states worldwide, and the regimes developed through the IMO's unique "spirit of cooperation," which generally requires broad consensus on issuance of new mandates, has done more to strengthen maritime security than any organization besides the Security Council.

The terrorist attacks of September 11, 2001 on the United States prompted a concerted response from the IMO, reflected in Assembly Resolution A.924(22).<sup>198</sup> In response to Resolution A.924(22), the Legal Committee of the IMO began a comprehensive review of existing maritime security treaties, and in particular the 1974 International Convention for the Safety of Life at Sea (SOLAS)<sup>199</sup> and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.<sup>200</sup> These two treaties formed the bedrock of maritime security authority in international law. Additionally, the asymmetric nature of the threat of Al-Qaeda inspired the member states of the IMO to conduct a comprehensive review to see if the instruments required updating. Both treaties were radically amended to meet the new threats to maritime security.

First, SOLAS was strengthened in December 2002, when the member states of the IMO adopted a new amendment regime to protect ships and port facilities from terrorist attack.<sup>201</sup> The revised SOLAS incorporates a new chapter XI, which includes the International Ship and Port Facility Security Code (ISPS Code).<sup>202</sup> The ISPS Code contains a comprehensive framework for governments, the shipping industry and

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198. IMO, *Review of Measures and Procedures to Prevent Acts of Terrorism which Threaten the Security of Passengers and Crews and the Safety of Ships*, IMO Assemb. Res. A.924(22) (Jan. 22, 2002) (adopted Nov. 20, 2001), available at [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D24550/A924%2822%29.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24550/A924%2822%29.pdf).

199. International Convention for the Safety of Life at Sea, Nov. 1 1974, 32 U.S.T. 47, 1184 U.N.T.S. 2.

200. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 201, 27 I.L.M. 668.

201. IMO, *Conference Resolution 1: Consideration and Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974*, IMO Doc. SOLAS/CONF.5/32 (Dec. 12, 2002); IMO, *Conference Resolution 2: Adoption of the International Code for the Security of Ships and of Port Facilities*, IMO Doc. SOLAS/CONF.5/34 (Dec. 12, 2002) [hereinafter Conference Resolution 2].

202. Conference Resolution 2, *supra* note 201, at 2.

port authorities to coordinate and manage, evaluate and improve maritime security practices.<sup>203</sup> The ISPS Code includes a mandatory section (Part A),<sup>204</sup> as well as a series of guidelines on measures to take to implement the requirements in a second, non-mandatory section (Part B).<sup>205</sup> National maritime administrators should establish maritime security levels and oversee implementation of the ISPS Code for vessels flying their flag.

Ships entering the port of a state party should comply with the security level established by the port authorities, if that level is higher than the security level set by the flag state's maritime administration. The new regulations require all ships to develop a security plan approved by the flag state and be outfitted with a security alert system.<sup>206</sup> Once activated, the security alert system transmits the alarm to designated maritime authorities, identifying the ship and its location.<sup>207</sup> The system does not raise any alarm on board the ship, and it may be used to alert shore side security of an unfolding threat, such as a ship under attack by terrorists or pirates. The security alert system must be capable of being activated from the navigation bridge and at least one other location on board the ship so that it can be triggered surreptitiously.<sup>208</sup> Although the SOLAS amendments are critically important in developing a comprehensive package of ship and port facility security measures for the global maritime transportation system, the provisions do not directly facilitate ship boarding. The 2005 Protocols to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), however, establish the most comprehensive boarding regime to date.<sup>209</sup> The 1988 Convention is called the *Achille Lauro* Treaty, because it was adopted in the wake of the terrorist attacks on the Italian cruise ship.<sup>210</sup>

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203. *Id.* at 6-7.

204. *Id.* at 4-30.

205. *Id.* at 31-91.

206. *Id.* at 11-13, 43-44.

207. IMO, *Guidance on Provision of Ship Security Alert Systems*, at 1, IMO Doc. MSC/Circ.1072 (June 26, 2003).

208. IMO, *Guidance on the Provision of Information for Identifying Ships When Transmitting Ship Security Alert*, at 1 n.3, IMO Doc. MSC.1/Circ. 1190 (May 30, 2006).

209. IMO, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005).

210. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 200, para 3.

C. *Suppression of Unlawful Acts Against the Safety of Maritime Navigation*

In 2002, the member states of the IMO began work on a comprehensive update of the original SUA or *Achille Lauro* Treaty of 1988. The remarkable story behind this effort dates back to 1985 when the Italian-flagged cruise ship *Achille Lauro* was hijacked by Palestinian terrorists, an episode that ended in the brutal murder of disabled American Jewish passenger, Leon Klinghoffer.<sup>211</sup> Many states did not have criminal legislation for extradition or prosecution for the crime of vessel hijacking. To fill this gap in the law, the year following the attack, Austria, Egypt, and Italy proposed that the IMO prepare a convention to facilitate law enforcement cooperation against ship hijackers.<sup>212</sup> The treaty provides a comprehensive set of rules to ensure close coordination among states to extradite and prosecute individuals who committed a number of capital crimes at sea, including seizure of a ship by force, acts of violence on board ships, and placement of bombs on board a ship.<sup>213</sup>

Article 3 of the 1988 SUA created the offense of unlawfully and intentionally seizing “control over a ship by force or threat thereof or any other form of intimidation,” while Article 8 provides a mechanism for flag states and vessel masters to deliver to the authorities of any state party an individual suspected of committing an offense covered by the Convention. The final treaty text became the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), which was adopted by the IMO at a conference in Rome in March, 1988, and entered into force on March 1, 1992.<sup>214</sup> Today the SUA has 156 state parties.<sup>215</sup> SUA commits member states to

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211. *Capture of Hijackers; 8 Americans Who Left Ship Before Hijacking Arrive Home*, N.Y. TIMES, Oct. 11, 1985, [http://www.nytimes.com/1985/10/11/world/capture-of-hijackers-8-americans-who-left-ship-before-hijacking-arrive-home.html?ref=leon\\_klinghoffer](http://www.nytimes.com/1985/10/11/world/capture-of-hijackers-8-americans-who-left-ship-before-hijacking-arrive-home.html?ref=leon_klinghoffer).

212. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, IMO (Nov. 11, 2011, 4:25 p.m.), <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx>. “In November 1986 the Governments of Austria, Egypt and Italy proposed that IMO prepare a convention on the subject [of maritime security].” *Id.*

213. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 200, art. 3.

214. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 200.

215. IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or other*

criminalize the unlawful and intentional seizure or exercise of control over a ship by force or threat.<sup>216</sup> The treaty further provides that state parties shall either prosecute a violation or extradite the suspect.<sup>217</sup>

The amendments to the 1988 SUA Convention unfolded between 2002 and 2005, resulting in development of two protocols—one that applies to ships and the other that applies to fixed platforms on the continental shelf. The 2005 Protocols concerning vessels adds a new Article, *3bis*, which commits states to criminalize the maritime transportation of WMDs, and their components and means of delivery.<sup>218</sup> The 2005 Protocol makes it an offense for a person to “unlawfully and intentionally” commit acts that “intimidate a population” or “compel a Government or international organization to do or abstain from doing any act,” including: using explosives, or biological, nuclear or chemical (BCN) weapons on or against a ship; using a ship in a manner that causes death or serious injury or damage, and transporting on the ship explosive, radioactive, or fissionable material or a BCN weapon that is intended to be used for terrorism, including so-called “dual use” items that may have a legitimate purpose, but nonetheless contribute “to the design, manufacture or delivery of a BCN weapon . . . .”<sup>219</sup> Article *3ter* creates an offense for unlawfully and intentionally transporting on board a ship someone known to be a terrorist.<sup>220</sup> Article *3quarter* creates an offense for unlawfully and intentionally injuring or killing any person in connection with one of the other offenses.<sup>221</sup> The new article also introduces inchoate crimes in this regard, including attempt, accomplice, organizing and directing offenses, or contributing to the commission of such crimes.<sup>222</sup>

A new Article *8bis* creates a comprehensive framework for ship boarding that may be utilized by one nation that seeks to board the ship of another flag state. The ship boarding procedures in the 2005 Protocol are comprehensive and detailed, calling on state parties to cooperate “to the fullest extent possible to prevent and suppress unlawful acts” covered

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*Functions*, at 389-393 (Oct. 5, 2010), available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20of%20Conventions%202010.pdf>.

216. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 200, art. 3(1)(a), 5.

217. *Id.* art. 7(1).

218. IMO, *supra* note 209, art. *3bis*.

219. *Id.* art. *3bis* (1)(a), (b).

220. *Id.* art. *3ter*.

221. *Id.* art. *3quarter*.

222. *Id.* art. *3quarter* (b)-(e).

in the Convention.<sup>223</sup> The procedures are triggered by one state having a “reasonable grounds to suspect” that a ship or person on board the ship is involved in one of the offenses identified in Article 3.<sup>224</sup> First, a party seeking to board the ship of another party should confirm the nationality of the vessel. If the nationality is verified, then the state seeking to board a foreign-flagged ship should request authorization from the flag state, including asking for permission to execute specific measures, such as stopping, boarding, or searching the ship or its cargo or persons on board. The flag state has the option of authorizing the boarding, conducting the boarding itself or in conjunction with the state making the request, or declining the request for boarding.<sup>225</sup>

Original contracting states for the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA 2005). <sup>226</sup>	
Country	Date of signature or deposit of instrument
Cook Islands (accession)	12 March 2007
Dominican Republic (accession)	9 March 2010
Estonia (ratification)	16 May 2008
Fiji (accession)	21 May 2008
Latvia (accession)	16 November 2009
Liechtenstein (accession)	28 August 2009
Marshall Islands (accession)	9 May 2008
Nauru (accession)	29 April 2010
Saint Kitts and Nevis (accession)	29 March 2007
Spain (ratification)	16 April 2008
Switzerland (accession)	15 October 2008
Vanuatu (accession)	20 August 2008

The 2005 Protocols are significant in several ways. First, the treaty expands the definitions of acts that constitute terrorism and transfers them to the maritime context. Second, it includes perhaps the most comprehensive international framework for countering the proliferation of WMDs. Third, the boarding provisions provide an enforcement

223. *Id.* art. 8bis (1).

224. IMO, *supra* note 209, art. 8bis(4).

225. *Id.* art. 8bis (a), (b).

226. IMO, *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Entry into Force*, at 2, IMO Doc. SUA.3/Circ. 11 (May 4, 2010).

mechanism within a multilateral terrorism and counter-proliferation treaty. The boarding provisions also contain safeguards to protect human rights, and persons embarked on vessels that are boarded are to be treated in accordance with international human rights law.<sup>227</sup> Finally, states may provide pre-approval of boarding of their ships by foreign-flagged warships under some circumstances. Any flag state may submit a declaration to the Secretary-General of the IMO authorizing boarding and search of its vessels by another state when the other state has reasonable grounds for believing that the ship or a person on board is suspected of a covered offense. Flag states also may file a similar declaration authorizing boarding of vessels of the flag state in cases where the flag state does not respond within four hours to a request to verify the registration of the vessel.<sup>228</sup>

## V. CONCLUSION

With PSI, Resolution 1540, and the 2005 SUA Protocols, nations are establishing a global, and increasingly effective, network of legal and policy authorities to synchronize intelligence and operations against terrorists and WMDs in the maritime domain. After five years, the 2005 SUA Protocols finally have entered into force. Although application of the Protocols has gotten off to a disappointingly slow start, a large number of additional ratifications would allow the SUA regime to gain momentum and would help states to codify the deep and rich collaboration already evident in the PSI into a formal international framework. While the flexibility of PSI has been a hallmark of its success, the lack of formal structure has made some nations—Malaysia and Indonesia, for example—reluctant to fully participate. For all of the groundbreaking and frankly astonishing success of PSI, some countries are wary of its informal nature and process. Although there is value in creating an interlocking network of formal and informal arrangements, the SUA protocols may end up eclipsing PSI. The era of the “coalition of the willing” may be coming to a close; the concept having been badly bruised by the U.S. experience in Iraq. Consequently, more formal multilateral arrangements, such as the SUA Treaty, now may generate greater international support than informal and less transparent initiatives.

If the 2005 amendments are to have a significant effect on international cooperation, states must not only accede to them, but utilize

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227. IMO, *supra* note 209, art. 8bis (10)(a)(ii).

228. *Id.* art. 8bis (5)(d).

them. The original 1988 SUA Convention, although widely accepted, has not played the role that it might have because states have neglected to implement legislation or make political commitments to ensure that it works. The shipping industry is especially hopeful that the 2005 amendments will attract widespread support. Shipping commerce is a global industry, relying on a common framework of norms and regimes. The industry can only operate efficiently when regulations applicable to a particular ship are identical in the port of departure, on the high seas, and in the port of arrival. Because PSI focuses on enlarging national authorities rather than global rules, it is more likely to inadvertently create a web of inconsistent national laws than would occur under the international legal regime of SUA.