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Maritime Interception: Centerpiece of Economic Sanctions in the New World Order

Lois E. Fielding*

I. INTRODUCTION

In the early morning hours of December 26, 1990, the *Ibn Khaldun*, an "Iraqi-flagged cargo ship," plied the waters of the northern Arabian Sea in the vicinity of Masirah Island as she proceeded to Basra, Iraq after leaving the port of Aden.¹ Out of sight, the *HMAS Sydney*, the *USS Olendorf* and the *USS Fife* coordinated operations and began the interception process adopted by the Multinational Interception Force (MIF).²

Using bridge to bridge radio, the on-scene commander issued the warning: "In accordance with its previously published notice to mariners, the United States intends to exercise its right to conduct a visit and search of your vessel under international law. Request you stop your vessel and prepare to receive my inspection team."³ The *Ibn Khaldun* refused to slow. The request was repeated until 5:30 a.m. when a U.S. Navy helicopter placed a team of Marines and SEALs from the amphibious ships *USS Trenton* and *USS Shreveport* on the *Ibn Khaldun*.⁴

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1. The description is based on accounts contained in Department of Defense, United States Central Command First Weekly Briefing (Dec. 26, 1990) (Question and Answer Briefers: Lt. Col. Mike Gallagher, Maj. Gen. Dave Starling, Lt. Col. Greg Pepin, Col. Tom Coury at Hyatt Hotel, Riyadh, Saudi Arabia) [hereinafter Central Command Briefing]; Molly Moore, *Challenge on the High Seas: Stop, Board, and Search*, Wash. Post, Dec. 27, 1990, at A1, § 1; *Severing Saddam's Lifeline: Maritime Interception Controls the Flow to Iraq*, 892 All Hands 10 (Desert Storm Special Issue: The Navy-Marine Corps Team 1991) [hereinafter *Severing Saddam's Lifeline*]; Tom Delery, *Away the Boarding Party!*, 71 Naval Institute Proceedings 66 (May 1991); Department of Defense, United States Central Command Weekly News Briefing (Jan. 16, 1991).

2. See the authorities cited in *supra* note 1.

3. Moore, *supra* note 1, at A1, § 1. The transmission of this notice is required by U.S. Navy procedure as part of the interception process. *Id.*

4. *Id.* See also *Severing Saddam's Lifeline*, *supra* note 1, at 12. During interceptions in which the target vessel refuses to allow boarding, the practice has included sailing one Allied vessel across the bow of the target vessel and firing warning shots across the bow of the target vessel. The procedure may include low-level passes by F-14 and F/A-18 aircraft. Delery, *supra* note 1, at 66.

At 5:40 a.m. the team slowed the ship, and at 6:00 a.m. a multinational team of Australian and U.S. sailors approached and boarded.⁵

The inspection team found large quantities of milk, rice, cooking oil, and sugar in addition to other prohibited cargo on board the *Ibn Khaldun* for which no permission had been obtained from the Security Council through U.N. procedure.⁶ The ship was diverted for being found in violation of U.N. sanctions.⁷

The operation involved only one of more than 15,000 vessels which had been intercepted and one of over 1000 vessels boarded throughout the Persian Gulf crisis. The coalition naval force in place was composed of more than 100 ships and 25,000 personnel contributed from about twenty countries.⁸ As a part of this force, the MIF, under the coordination of Admiral Mauz, Commander of the Seventh Fleet, included more than forty-five U.S. ships and 15,000 U.S. personnel and more than thirty ships from foreign forces.⁹ Twenty ships of this force were

5. *Severing Saddam's Lifeline*, *supra* note 1, at 12; Delery, *supra* note 1, at 66; Moore, *supra* note 1, at A1, § 1. After verifying the manifest and inspecting the vessel, the boarding party attempted to advance to the pilot house. A crew member moved to block the approach and take the weapons of the inspection team. *Id.*

The team fired "pistol warning shots into the air" and discharged smoke grenades and noisemaker grenades to control the crowd. There were no injuries reported by the inspection team or the *Ibn Khaldun* crew; however, the ship's master claimed that four *Ibn Khaldun* passengers were injured during inspection team activities. *Id.*

A United States military doctor boarded the ship in order to determine the seriousness of the injuries, but found no evidence of injury to passengers. The master of the *Ibn Khaldun* took the position that "the passengers did not require medical evacuation." *Id.*; see Central Command Briefing, *supra* note 1.

6. The *Ibn Khaldun* transported sugar, milk, spaghetti, and tea to Umm Qasar and "hosted nearly 250 passengers later identified as 'peace activists' protesting the embargo of Iraq . . ." *Severing Saddam's Lifeline*, *supra* note 1, at 13.

7. *Id.* The Iraqi version differs. The Deputy Prime Minister and Foreign Minister Tariq Aziz, in a letter dated December 27, 1990 (ME/0957/A/1) to U.N. Secretary-General Javier Perez de Cuellar, charges that

seven warships, one of which was an aircraft carrier belonging to US and British forces, at 0445 [Baghdad] local time [0145 gmt] yesterday, 26th December 1990, carried out a barbarous aggression against the peace ship *Ibn Khaldun*. . . . The attacking soldiers were aggressive towards the ship's crew and the women and children, pelted them with tear-gas and stun grenades and fired shots in the air to terrorize the peace messengers, the women and children who were on board the ship. The aggressors then detained the ship's captain and crew, seized all its documents and destroyed all the videotapes and recordings in the possession of several journalists representing television stations in Iraq, Yemen and Japan.

8. Delery, *supra* note 1, at 66. The data regarding interception and boarding was supplied by Commander Michael Hinkley JAGC, USN assigned as Force Judge Advocate to Commander Middle East Force on board the flagship *USS LaSalle* in the Persian Gulf from September 1989 to August 1991 (Nov. 1, 1991) (Correspondence of Nov. 30, 1992 in author's files).

9. Rear Adm. W. Fogarty, Department of Defense, United States Central Command

used exclusively in the interception operation itself.¹⁰ The success of the maritime interception operations has been attributed to the "professionalism of all the navies, innovative communications plans, and frequent coordination meetings."¹¹ "If ever there were an example of international resolve, the intercept operations has to be it."¹² Overwhelmingly, U.N. member states complied with Resolutions 661, 665, and 670 and supported the Persian Gulf naval interception effort even, in a number of instances, in the face of mounting domestic economic losses and internal strife and opposition.¹³

This article reviews the legal criteria of maritime operations and the historical practice of maritime zones in the hostile setting from World War I to the present day.¹⁴ The Persian Gulf interception is analyzed as a method of sanction enforcement in the "new world order."

As economic sanctions emerge as a principal method of maintaining stability in the post-cold war era and promote the use and further development of limited naval operations as a sanctioning device, the realities of cooperation, accountability, and high visibility of state activity in this changed environment impose limitations and establish additional criteria on naval operations utilized as such. As the "first defining event of the post-Cold War world," the Persian Gulf operation is a subject of analysis which permits observation of these limitations and criteria.¹⁵ The Persian Gulf interception could establish the paradigm of the maritime zone permitting limited naval operation conducted on a multilateral basis under the authority of the United Nations or other international organization with the purpose of maintaining peace and stability of the world order.¹⁶ As a maritime action undertaken to enforce sanctions

Weekly News Briefing (Jan. 16, 1991). Delery, *supra* note 1, at 66-67. Foreign navies involved include The United Kingdom, France, Denmark, Netherlands, Norway, Spain, Italy, Greece, Belgium, Canada, Australia, Argentina, the United States, the "Gulf Cooperation Council countries" of Saudi Arabia, the United Arab Emirates, Bahrain, and Qatar. *Id.*

10. Delery, *supra* note 1, at 66.

11. *Id.* at 68.

12. Fogarty, *supra* note 9.

13. *Sanctions: 106 Countries Reply*, U.N. Chron. 13 (Dec. 1990). "On 6 September, the Secretary-General reported that 140 replies had been received from 106 countries on measures taken to implement the sanctions. Nine States—Bulgaria, India, Jordan, Lebanon, Philippines, Romania, Sri Lanka, Tunisia, Yugoslavia—indicated they were confronted with special economic problems in carrying out Resolution 661." *Id.*

14. Whiteman dichotomizes naval operations in this area as "blockade" and "measures distinguished from blockade." 10 M. Whiteman 872 (1968).

15. Paul H. Nitze, *World Order from Hiroshima to Kuwait*, 44 Naval War College Review 7, 14 (Autumn 1991).

16. *Id.* Nitze argues for a "new strategic concept" of U.S. leadership with the United States "as an honest broker seeking the accommodation and protection of diversity within

previously established under Article 41,¹⁷ and endorsed subsequently by the Security Council under Chapter VII of the U.N. Charter, the interception offers the opportunity to study the further development and clarification of U.N. Charter principles.

II. CRITERIA OF LAWFULNESS OF MARITIME ZONES IN HOSTILE SETTINGS

Treaty and convention law developments in the law of blockade generally have been attempts to control and structure the practice in a more organized, restrained, and humane manner. However, the only convention or treaty principles that have been preserved in practice are those that proved workable or practical considering the manner of warfare and the state of weaponry technology at the time. As Tucker has astutely observed:

For the most part, it would appear, neutral protests failed to acknowledge that a significant area of neutral-belligerent relations depended upon the character of hostilities and the restraints belligerents would feel compelled to accept, not as a matter of strict law but for reasons of expediency. And this implied, in turn, that belligerent interferences with neutral trade by sovereign right could be contested on the political and economic levels though only with difficulty on a legal basis.¹⁸

At what point "reasons of expediency" take precedence over "strict law" is unclear and can only be evaluated by analyzing the conduct of nations in war. Certainly, it is fundamental that, even if states feel compelled to observe principles of laws of war from a sense of legal obligation, the principles will be transgressed if the nation's survivability deems it necessary.

There does exist a classic model of blockade¹⁹ against which the lawfulness of a particular blockade may be measured; however, this model has been largely disregarded in practice because of innovations largely tied to modifications in naval warfare. The key to understanding the changes in the form of blockade and the variety of techniques in evidence over the history of naval operations is to realize that the form of each maritime zone and its method of enforcement is dictated by

a cooperative international framework. . . . In fact, U.S. leadership of the international response to the Iraqi invasion of Kuwait, which has been aptly described as the first defining event of the post-Cold War world, represents precisely the type of effort the strategic concept envisages." *Id.* at 14.

17. U.N. Charter art. 41.

18. 10 M. Whiteman 793 (1968) citing Tucker, *The Law of War and Neutrality at Sea* 184-85 (1955).

19. See *infra* note 21 and accompanying text.

the specific features of the particular conflict at hand as well as the military objectives to be obtained in that conflict. Factors which can be isolated as shaping and defining the zone include, among others, the objective of the war zone, the sophistication of arms technology available, the number and location of the belligerents, the strategy of warfare, the configuration of the coastline, and the extent of ocean covered.²⁰

The complexities of warfare innovations have made it difficult for convention law to accurately control or keep abreast of the proliferating features of maritime zones in hostile settings. While some convention law in this area was an attempt to codify customary international law, others were aspirational. Regardless, none has been satisfactory in structuring blockade operations, and most were abandoned or considered outdated before or shortly after commencement of hostilities. Hence, the law of blockade is largely customary international law with convention law providing support.

A. 1856 Declaration of Paris and 1909 Declaration of London

In large part, the traditional law of naval blockade is an accommodation of the need of a belligerent to subjugate the opposing belligerent by inflicting damage on its ability to sustain a war effort, both materially and psychologically, and the need of neutrals to carry on world trade and maintain a stable world economy.²¹ This accommodation is apparent in the 1856 Declaration of Paris and the 1909 Declaration of London.

20. Edward W. Carter, *Blockade*, Naval Institute Proceedings 42 (Nov. 1990); see also Horace B. Robertson, *Interdiction of Iraqi Maritime Commerce in the 1990-1991 Persian Gulf Conflict*, 22 Ocean Dev. and Int'l L.J. 289 (1992). Frits Kalshoven lists as developments affecting the law of prize the following:

[I]ntroduction and increased deployment of the submarine, followed by that of the air arm; increasingly widespread use of mines of all types; establishment of danger areas, war zones, exclusion zones, etc.; practice of "sink-on-sight," both within and beyond such zones; blockade of entire coasts; virtually unchecked extension of the lists of contraband goods; application of the doctrine of continuous voyage to all such goods; diversion of neutral commercial shipping to belligerent ports instead of search at sea; issue, by belligerent consular authorities in neutral ports, of documents testifying to the non-contraband character of cargo or to the innocent character of the vessel (navicerts); convoy of neutral vessels by belligerent warships; and so on.

Frits Kalshoven, *1909 London Declaration Concerning the Laws of Naval Warfare*, in *The Law of Naval Warfare* 257, 272 (Natalino Ronzitti ed. 1988).

21. "The law establishes a balance of interests that protects neutral commerce from unreasonable interference on the one hand and the right of belligerents to interdict the flow of war materials to the enemy on the other." Department of the Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations NWP 9 (REV.A)/FMFM 1-10 7-24 (1989)* [hereinafter *Annotated Supplement to the Commander's Handbook*].

The fundamental concept of the close-in blockade as established by the 1856 Declaration of Paris and the 1909 Declaration of London remains the paradigm of the concept of blockade, at least for the U.S. Navy. This is acknowledged and reflected in The Commander's Handbook on the Law of Naval Operations of the U.S. Navy (Commander's Handbook). Although the Commander's Handbook describes the "traditional rules of blockade" as being "for the most part customary in nature, having derived their definitive form through the practice of maritime powers during the nineteenth century," the principles of blockade set forth are the basic principles of blockade established in the Declarations of 1856 and 1909.²²

First, "a blockade must be established by the government of the belligerent nation. . . . The declaration should include, as a minimum, the date the blockade is to begin, its geographic limits, and the grace period granted neutral vessels and aircraft to leave the area to be blockaded."²³ Second, "it is customary for the belligerent nation establishing the blockade to notify all affected nations of its imposition."²⁴ Third, "in order to be valid, a blockade must be effective."²⁵ Fourth, "a blockade must be applied impartially to the vessels and aircraft of all nations."²⁶ Finally, "a blockade must not bar access to or departure from neutral ports and coasts."²⁷ Rights of neutral nations and rights of belligerents are balanced by protecting all neutral commerce except that which emanates from or is bound for blockaded territory.²⁸

22. Office of the Chief of Naval Operations, The Commander's Handbook on the Law of Naval Operations NWP 9 (Rev.A)/FMFM 1-10, 7.7.1 (1989) [hereinafter Commander's Handbook]. According to the Commander's Handbook, "[T]he belligerent right of blockade is intended to prevent vessels and aircraft from crossing an established and publicized cordon separating the enemy from international waters and/or airspace." *Id.*

23. *Id.* at 7.7.2.1. This principle is derived from the 1909 London Declaration, article 9 which states, "A declaration of blockade must include 1) The date when the blockade begins; 2) The geographical limits of the coastline under blockade; 3) The period within which neutral vessels may come out." Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-35 nn.129 & 130.

24. Commander's Handbook, *supra* note 22, at 7.7.2.2; *Id.* at 7-35, 7.7.2.2. This principle is based on the 1909 London Declaration, articles 11 and 16. Article 11 states, "A declaration of blockade is notified: 1) To neutral powers, . . . 2) To the local authorities" Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-35, n. 131.

25. Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-35, 7.7.2.3. This is derived from the 1856 Paris Declaration, article 4 and the incorporation of that principle in the 1909 London Declaration, article 2. Article 2 of the London Declaration states, "In order to be binding, a blockade must be effective." *Id.* at 7-35 n.132.

26. *Id.* at 7-36. The impartiality principle is derived from the 1909 London Declaration, article 5 which states, "A blockade must be applied impartially to the ships of all nations." *Id.* at 7-36, n.133.

27. *Id.*

28. *Id.* at 7-36. In fact, a "right" exists in neutral nations "to engage in neutral

B. U.N. Charter

1. Use of Force

Subsequent to October 24, 1945, when the U.N. Charter entered into force,²⁹ the establishment of maritime zones, as a measure of force, must be undertaken consistently with U.N. Charter provisions. Use of force is permitted under the U.N. Charter if it qualifies as a valid measure of self-defense undertaken in accordance with Article 51, a measure authorized by the Security Council under Chapter VII generally or under Article 42 specifically, an enforcement action within a regional arrangement undertaken with the authorization of the Security Council under Article 53, or otherwise authorized by an organ of the U.N.³⁰ Conversely, the maritime practices involving use of force must not qualify as an unprivileged "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" under Article 2(4).³¹

commerce that does not involve trade or communications originating in or destined for the blockaded area." This is derived from Article 18 of the London Declaration, which states, "The blockading forces must not bar access to neutral ports or coasts." *Id.* at 7-36, n.134.

29. Leland M. Goodrich et al., *Charter of the United Nations* 9 (1969).

30. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . ." U.N. Charter art. 51.

"Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. Charter art. 42.

"The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . ." U.N. Charter art. 53.

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art 2, para. 4.

31. See G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950). *But see* Certain Expenses of the United Nations, (I.C.J. 1962) ("action" in Article 11(2) interpreted as "enforcement action"). John Norton Moore, *The Use of Force in International Relations: Norms Concerning the Initiation of Coercion*, in National Security Law 182 (John Norton Moore et al. eds. 1990) [hereinafter Moore, *The Use of Force*]; Rosalyn Higgins, *Institutional Modes of Conflict Management*, *Id.* at 193, 239. See D.W. Bowett, *United Nations Forces*, 290-95 (1964).

For in-depth discussion of use of force under the U.N. Charter, see Moore, *The Use of Force*, *supra*, at 85-157; Michael N. Schmitt, *Aerial Blockades in Historical, Legal and Practical Perspective*, 2 U.S. Air Force Acad. J. of Legal Stud. 21, 32-33 (1991).

The interpretation of the right of self-defense under Article 51 has been debated at length. One view interprets Article 51 as limiting the customary international law right of self-defense to a defense against an actual armed attack only.³² In accord with this view, the International Court of Justice (ICJ) defines the right of individual and collective self-defense under Article 51 in the Nicaragua Case as exercisable only in response to an "armed attack."³³ The ICJ in the Nicaragua Case expressly takes no position on anticipatory self-defense. Another view interprets Article 51 as not limiting the inherent customary international law right of self-defense, and therefore not strictly limiting it to a response against armed attack. Professor John Norton Moore describes the right of defense under Article 51 as "parallel to that existing under customary international law."³⁴ This view allows a right of anticipatory self-defense and is supported in varying degrees as well by McDougal, Bowett, and Stone.³⁵ The United States adheres to the view that a threat of imminent attack gives rise to a right of anticipatory self-defense.³⁶ Without U.N. authorization, the right to resort to a blockade or other

32. This is the view espoused by Wright with "a small and special exception for . . . surprise nuclear attack." Quincy Wright, *The Cuban Quarantine*, 57 Am. J. Int'l L. 546 (1963); Louis Henkin, *How Nations Behave* 141-45 (2d ed. 1979).

33. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 1 (June 27).

34. John N. Moore, *Iraq's Aggression Against Kuwait: Enforcing the Rule of Law in the Gulf Crisis*, 4 J. Contemp. Legal Issues 1, 44 (1991-92) [hereinafter Moore, *Enforcing the Rule of Law*]; Moore, *The Use of Force*, *supra* note 31, at 87 ("It should also be noted that most scholars regard this defensive right in the Charter as coextensive with the pre-Charter right of defense, that is, as an 'inherent' or 'natural' right of defense"); U.N. Charter art. 51; Gerhard Von Glahn, *Law Among Nations* 133 (1965).

35. Myres S. McDougal, *The Soviet Cuban Quarantine and Self-Defense*, 57 Am. J. Int'l L. 597, 599-601 (1963) ("There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states") (quoting *International Control of Atomic Energy: Growth of a Policy*, Dept. of State Pub. 2702, at 164 (1946)); Philip C. Jessup, *A Modern Law of Nations* 166-67 (1948) ("It is equally clear that an 'armed attack' is now something entirely different from what it was prior to the discovery of atomic weapons"); Wolfgang Friedmann, *The Changing Structure of International Law* 259-60 (1964) ("in the absence of effective international machinery the right of self-defence must probably now be extended to the defence against a clearly imminent aggression, despite the apparently contrary language of Article 51 of the Charter"); Louis Henkin et al., *International Law, Cases and Materials* 736-46 (2d ed. 1987).

36. *The Caroline*, 2 Moore, *Digest of International Law* § 217, at 412 (1906) citing Letter from Mr. Webster, U.S. Sec. of State, to Mr. Fox, British Min. at Wash. D.C. (April 24, 1841).

The U.S. position on anticipatory self-defense is based on the Caroline requisites that the necessity of self-defense be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" together with the additional requirements of necessity and proportionality. Annotated Supplement to Commander's Handbook, *supra* note 21, at 4-12, 4-13 n.29 (quoting *The Caroline*, *supra* at 412).

maritime zone remains as unclear and undefined as the right of self-defense under Article 51.

The United Nations' "Definition of Aggression" Resolution (Definition) specifically lists "the blockade of the ports or coasts of a State by the armed forces of another State" as an act of aggression "regardless of a declaration of war."³⁷ Article 2 provides that "[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression"³⁸ Therefore, even outside of the traditional laws of war regime, under the resolution, blockade remains an act categorized as an act of aggression. While the Definition throws doubt on the first use of blockade, an anticipatory defense use of blockade possibly could be "justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity" as permitted under Article 2 of the Definition.³⁹ Otherwise, blockade is condemned by a presumption of aggression unless justified under Article 51 of the U.N. Charter. Note that the use of "blockade" in the Definition does not necessarily include the more limited zones of quarantine, interdiction, or interception. Also note that the United States considers this resolution as "intended only" to give the Security Council guidance in acting under Chapter VII of the U.N. Charter.⁴⁰ The use of a maritime interception zone by a state or states without authorization by the United Nations, even though less intrusive than blockade, as a measure of economic coercion in response to an objectionable policy not involving force of the target state, is subject to attack as unlawful intervention under the Nicaragua case.⁴¹ Use of a maritime interception zone as a sanctioning device by a state without the United Nations' authorization in an en-

37. "Definition of Aggression" Resolution, General Assembly of the United Nations, Dec. 14, 1974, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, Art. 3, U.N. Doc. A/9631 (1974) [hereinafter "Definition of Aggression" Resolution]. For discussion of "Definition of Aggression" Resolution regarding blockade, see Schmitt, *supra* note 31, at 32.

38. "Definition of Aggression" Resolution, *supra* note 37, at 142, Art. 2.

39. *Id.*

40. Moore, *The Use of Force*, *supra* note 31, at 93.

41.

As to the content of the principle in customary law, the Court defines the constitutive elements which appear relevant in this case: a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 1, § X, para. 10 n.32 (June 27); see "Definition of Aggression" Resolution, *supra* note 37, at 142.

vironment in which economic sanctions are increasingly employed for a multiplicity of purposes appears to be limited to the Article 51 self-defense requirement.

2. *Neutrality Under the U.N. Charter*

The status of neutrality remains possible under the U.N. Charter only when the Security Council does not act to denominate an aggressor under Chapter VII. Article 2(5) obligates member states to assist the United Nations "in any action it takes in accordance with the present charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."⁴² Article 49 obligates member states to "join in affording mutual assistance in carrying out the measures decided upon by the Security Council."⁴³

As long as the Security Council does not or cannot engage in enforcement action under Chapter VII because of the permanent member veto, member states have no obligation to "discriminate against" an aggressor and may remain neutral.⁴⁴ Theorists speculate that even when the Security Council does not act, traditional belligerent rights regarding neutrals have been changed by the U.N. Charter and must be reconciled with the Article 51 right of self-defense. O'Connell postulates that U.N. Charter provisions limiting use of force "have deprived belligerents of the rights which they previously possessed against neutrals, such as the right of visit and search on the high seas and seizure of contraband."⁴⁵ Similarly, Oxford argues that the traditional rights of neutrals are correspondingly limited to conform to the Article 51 right of self-defense.⁴⁶ Conversely, Ronzitti argues that rights of neutrals remain as established in the law of war and limit the ability to use force in self-defense under Article 51.⁴⁷

42. U.N. Charter art. 2(5).

43. U.N. Charter art. 49. See also U.N. Charter arts. 24(1), 25 and 48 and discussion in Moore, *Enforcing the Rule of Law*, *supra* note 34, at 26.

44. Annotated Supplement to the Commander's Handbook, *supra* note 21, at 76 n.20.

45. D.P. O'Connell, *The Influence of Law on Sea Power* 160 (1975) (cited in Natalino Ronzitti, *The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for Its Revision*, in *The Law of Naval Warfare* 6 (Natalino Ronzitti ed. 1988)) [hereinafter Ronzitti, *The Crisis in the Law of Naval Warfare*]. That the right of visit and search remains is indicated by the repeated assertion of the right in recent naval operations. The Cuban quarantine and the Persian Gulf interception are based on the right of visit and search.

46. T. Oxford, *Exclusion Zones at Sea: Some Observations on the Conduct of the Falkland War 1982*, in *Sea Changes* No. 2, at 94 (1980). See Ronzitti, *The Crisis in the Law of Naval Warfare*, *supra* note 45, at 6.

47. Ronzitti, *The Crisis in the Law of Naval Warfare*, *supra* note 45, at 6-7.

The stronger argument is that traditional belligerent rights survive to be asserted in conformity with the right to use force under the U.N. Charter. Correspondingly, those states which assert a neutral status when the Security Council does not act to denominate an aggressor must assert their neutral rights consistently with the other party's right to use force under the U.N. Charter as well. Otherwise, rights under the U.N. Charter would be secondary to traditional laws of war and would leave the accomplishments of the U.N. Charter, the outlawing of war and the limited right to resort to force, in question. States' practice in the Cuban quarantine, the Vietnam interdiction, and the Persian Gulf interception support this interpretation. Although the naval operations in all three instances did not conform to traditional rights of neutrals in that the belligerent right of visit and search was asserted without a formal declaration of war, the operations complied with the right of self-defense under Article 51.⁴⁸

The Security Council established sanctions against Iraq under Chapter VII by Resolution 661 on August 6, 1990, and adopted Resolution 665 authorizing the force necessary to enforce the sanctions. The Council "called for strict and complete compliance with the embargo" under Resolution 670 and, evidently, United Nations members would have been sanctioned for noncompliance.⁴⁹ Neutral status did not exist regarding the embargo, and possibly regarding the interception operation itself. This presents the question whether the MIF could utilize the territorial seas of nonbelligerents and international straits for the assertion of the belligerent right of visit and search.⁵⁰ In practice, some territorial sea and international strait areas were used by the MIF for interception duties, but only with permission of the littoral state or otherwise in accordance with international law.⁵¹

C. 1982 United Nations Convention on the Law of the Sea

Under customary international law, belligerent rights could not be asserted within neutral territory.⁵² Thus, traditionally, naval warfare

48. See Schmitt, *supra* note 31, at 32 for an opinion in accord with this assertion.

49. *Comprehensive Mandatory Sanctions Imposed Against Iraq*, U.N. Chron. 7 (Dec. 1990).

50. See U.N. Charter art. 49.

51. Telephone interview with Commander Michael Hinkley JAGC, USN, assigned as Force Judge Advocate to Commander Middle East Force on board the flagship *USS La Salle* in the Persian Gulf from September 1989 to August 1991 (Nov. 1, 1991). Information regarding which states granted permission to components of the MIF to utilize their territorial seas remains classified. *Id.*

52. 1970 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War reprinted in Adam Roberts & Richard Guelff, Documents on the Laws of

could take place only within the territorial seas of belligerents and on the high seas.⁵³ The 1982 Law of the Sea Convention is interpreted as not affecting directly the laws of naval warfare. However, the permissible extension of the three-nautical-mile territorial sea to twelve nautical miles removes over three million square miles of ocean from hostile action.⁵⁴ Since the exclusive economic zone and the contiguous zone are recognized as high seas under the 1982 Law of the Sea Convention, belligerent rights such as visit and search may be asserted in these areas off the coast of nonbelligerent and neutral littoral states.⁵⁵

Article 37 of the 1982 Law of the Sea Convention allows transit passage through straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or exclusive economic zone subject to transit passage.⁵⁶ Articles 44 and 45 provide there is no suspension of transit passage through international straits, nor, if applicable, innocent passage under

War 109 (2d ed. 1989).

Article 1 states: "Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality." *Id.*

Article 2 states: "Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden." *Id.*

Article 4 states: "A prize court can not be set up by a belligerent on neutral territory or on a vessel in neutral waters." *Id.*

Article 5 states: "Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea." *Id.*

Roberts and Guelff list international agreements which affect neutrality in naval warfare as the following: 1856 Paris Declaration on maritime law, 1907 Hague Convention VII on the conversion of merchant ships, 1907 Hague Convention VIII on automatic submarine mines, 1907 Hague Convention XI on the right of capture, 1907 Hague Convention XII on an International Prize Court (unratified), 1909 Declaration of London on the laws of naval war (unratified), and 1949 Geneva Convention II on wounded, sick, and shipwrecked. *Id.*

53. Ronzitti, *The Crisis in the Law of Naval Warfare*, *supra* note 45, at 13.

54. The 1982 U.N. Convention on the Law of the Sea states that the law of war "continues to be governed by the rules and principles of general international law."

Upon signing the U.N. Law of the Sea Convention, Sweden declared that "[i]t is . . . the understanding of the Government of Sweden that the Convention does not affect the rights and duties of a neutral state provided for in the Convention concerning the Rights and Duties of Neutral Powers in case of Naval Warfare (XIII Convention) adopted at the Hague on 18 October 1907." Ronzitti, *The Crisis in the Law of Naval Warfare*, *supra* note 45, at 30; *see also* Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-19 n.63.

55. Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-19 n.63.

56. Article 37 of the 1982 U.N. Convention on the Law of the Sea. *See* Annotated Supplement to the Commander's Handbook, *supra* note 21, at 2-18 n.36.

Article 45 (1)(a) and (b). Therefore, neutral nations cannot hinder or impede the right of belligerent and neutral surface vessels, submarines, and aircraft to transit the straits.⁵⁷ The duties of transit passage under Article 39 prohibit belligerent forces from using neutral straits as a "place of sanctuary or a base of operations," and they must instead proceed without delay and refrain from the threat or use of force.⁵⁸

Belligerent forces may not engage in visit and search in international straits.⁵⁹ Similarly, while belligerent ships or aircraft, including submarines, surface warships, and military aircraft, have a right of innocent passage "through, over and under neutral archipelagic sea lanes" by Articles 53, 54, and 44 of the 1982 U.N. Convention on the Law of the Sea, visit and search or other assertion of belligerent rights is not permitted.⁶⁰ An exception to these limitations is established by Articles 1 and 2 of the Hague Convention XIII which allows measures of self-defense or self help to be undertaken by a belligerent when the neutral state is unable to eject the opposing belligerent from its waters.⁶¹

D. Law of Armed Conflict Principles

Even though a blockade may conform to the legal requirements as established in the 1856 Declaration of Paris, the 1909 Declaration of London, the Charter of the United Nations, and the 1982 Convention on the Law of the Sea, it still must comply with the basic principles of the law of armed conflict: military necessity, humanity, and proportionality.⁶² Simply put, "military necessity" is the permissive variable which allows measures necessary for bringing war to a conclusion, while "humanity" is the prohibitive variable which forbids any unnecessary suffering.⁶³ Proportionality restricts the level of collateral damage per-

57. Articles 44 and 45 of the 1982 U.N. Convention on the Law of the Sea. Even when a neutral nation closes its territorial waters to belligerent vessels on a nondiscriminatory basis as permitted under Articles 25(3) and 45(2) of the 1982 U.N. Convention on the Law of the Sea, it may not similarly close the international straits under Article 45(2). See Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-20.

58. Article 39(1) of the 1982 U.N. Convention of the Law of the Sea; Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-20.

59. 1907 Hague Convention XIII, art. 5 in Roberts & Guelf, *supra* note 52; Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-20 n.72.

60. Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-21 and 7-21 n.76.

61. *Id.* at 7-21.

62. Naval Justice School, Law of the Sea and Law of Naval Warfare 20 (1987) [hereinafter Naval Justice School].

63. *Id.* at 45.

missible by requiring an "acceptable relation between the legitimate destructive effect and undesirable collateral effects."⁶⁴

III. CONTEMPORARY PRACTICE OF STATES REGARDING MARITIME ZONES IN THE HOSTILE SETTING

Prior to World Wars I and II, two basic structures developed to allow belligerents to deter trade by sea which would aid an enemy during time of war.⁶⁵ Blockade, the more drastic measure, permits the total deprivation of the enemy of all outside commerce by preventing all ships of any nationality whether belligerent or neutral from entering or leaving the blockaded coastline or ports. This measure was accomplished traditionally by stationing ships off the coastline or ports of the enemy in accordance with the strict requirements of blockade as they developed during the seventeenth, the eighteenth, and beginning of the nineteenth centuries.⁶⁶

Prohibitions against contraband, the other measure, are aimed at cargo, not ships, and allow the selective "interdiction" or confiscation of goods which, first, are destined for the enemy and, second, would be or potentially could be used to support the enemy's war campaign.⁶⁷ The belligerent right of visit and search, which supports the practice of confiscation of contraband, allows a belligerent to stop and inspect belligerent or neutral merchant vessels, but not warships, outside neutral territory in order to determine whether the vessel carries contraband or exempt "free goods," whether the vessel is enemy or neutral, and whether the vessel is engaged in hostile or belligerent activity.⁶⁸ The law

64. *Id.* Notice should be taken of the possibility that the weight of criteria for measuring the legality of blockade may be changing as the power relationships and the interactive process reflective of the dissolution of the cold war shifts to accommodate the "new world" configuration. This may be especially true of the economic blockade or interdiction because of the heightened awareness of and emphasis on human rights or "human values" accompanying the changing order. The "acceptable relation" between legitimate damage and collateral damage may shift correspondingly to reflect a decreased acceptable range of damage to the civilian component during armed conflict.

65. Horace B. Robertson, *The Law of the Sea*, in National Security Law, *supra* note 31, at 733.

66. *Id.*

67. *Id.*

68. Annotated Supplement to the Commander's Handbook, *supra* note 21, at 7-6.

Traditionally, the right of visit and search is not an act of war but a belligerent right which can "only be exercised after the outbreak, and before the end of war." 2 Lassa Oppenheim, *International Law* § 415, at 848 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter Oppenheim]. Yet, "visitation is not an act of warfare . . ." *Id.* at 849.

Visitation is "not an independent right," but exists to support other belligerent rights. Lauterpacht states that visitation is involved in "the right of either belligerent . . . to punish neutral vessels breaking blockade, carrying contraband, and rendering non-neutral service. It is a *right*, in contradistinction to the *duty*, of every belligerent to visit an *enemy* merchant man if he desires to capture her." *Id.* at 849 n.1 (emphasis in original).

of contraband permits the capture and condemnation of contraband if it is destined for territory belonging to or occupied by the enemy or to the armed forces of the enemy.⁶⁹ Blockade, on the other hand, prevents both imports into and exports out of enemy territory.⁷⁰ Whereas a blockade, in order to conform to the traditional requirements of blockade set forth in the London Declaration of 1909, must be confined to a specifically identified area and subject to the requirement that the blockade not bar access to neutral ports, the interdiction of contraband, supported by the belligerent right of visit and search could occur anywhere outside of neutral territory.⁷¹

A. World War I and World War II

New technological developments available during World War I in weaponry and naval warfare techniques, specifically new mines, submarines, torpedoes, and aircraft, prevented states from maintaining the "traditional" close-in blockade with its legal characteristics.⁷² Surface vessels stationed within a limited area were too vulnerable to attack. Instead, massive sea areas were patrolled by surface vessels, and U-boats, or submarines. Wide areas were mined by both sides in an attempt to control ingress and egress from the coastline throughout the European continent. Theorists speculated that the close blockade had become obsolete.⁷³ The World War I long-distance blockades of the British and the war zones of the Germans departed from the legal requirements of blockade: establishment, notice, effectiveness, impartial application, and specific, limited area. The British patrolled extensive sea zones and required all trade passing through such areas, whether destined for enemy

69. 1909 London Declaration Concerning the Laws of War, art. 30, Feb. 26, 1909, published in 3 Am. J. Int'l L. 179-220 (Supp. 1909) (Fr. and Eng.).

Contraband is the "designation of such goods as are forbidden by either belligerent to be carried to the enemy on the ground that they enable him to carry on the war with greater vigor." Oppenheim, *supra* note 68, § 391, at 799. Tucker explains:

[I]t has long been customary to characterize the problems arising with respect to neutral commerce in terms of two conflicting rights: the right of the neutral state to insist upon continued freedom of commerce for its subjects despite the existence of war and the right of the belligerent to prevent neutral subjects from affording assistance to the military effort of an enemy.

Robert W. Tucker, *International Law Studies: The Law of War and Neutrality at Sea 1965* (1955).

70. Kalshoven, *supra* note 20, at 262.

71. Robertson, *supra* note 65, at 733. See Oppenheim, *supra* note 68, at 848-61.

72. Carter, *supra* note 20, at 42-44.

73. *Id.*; Robertson, *supra* note 20, at 289-90.

ports or neutral ports, to proceed to allied ports for a search for contraband which, if found, was confiscated.⁷⁴ The British established designated "mined areas" in reprisal to destroy German submarines operating in violation of the Hague Convention VIII. Within German war zones, both belligerent and neutral merchant vessels were destroyed by unrestricted warfare and scattered mines and, in contrast to the British practice of designating safe routes for neutral commercial shipping, Germany designated no safe routes.

During World War II, the British again established "long distance blockade" zones in the Atlantic whereas Germany resorted to "war zones" in the waters off Britain and France. While Germany initially warned neutral nations that passage even by neutrals through these zones was dangerous, and while German submarines initially allowed targeted vessels' crews to abandon ship, indiscriminate "attack without warning" on neutral and belligerent shipping became the German practice. The British tightened this control over neutral trade by instituting the Navicert system, which required neutral trade to obtain British certification of cargo and routes or risk interception, seizure, and, probably, condemnation.⁷⁵ German war zones were enforced by aircraft and undisclosed mine fields. The illegality of British long-distance blockades of World Wars I and II has been excused by some theorists as reprisals against the clearly illegal German war zones.⁷⁶ The practices of World Wars I and II not only deviated substantially from the form and procedures as established by the traditional law of war but, in doing so, substantially diminished the rights of neutrals. The total economic war required the cutting off of all exports and imports alike because either could support

74. Maxwell Jenkins, *Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 8 B.C. Int'l & Comp. L. Rev. 517, 529 (1985); Oppenheim, *supra* note 68, at 791-95.

75. Jenkins, *supra* note 74, at 531. Oppenheim, *supra* note 68, at 791-95.

76. "So neutrals who do not prevent one belligerent from unlawfully obstructing commercial intercourse between his opponent and themselves cannot complain if that opponent replies by resorting to measures designed to stop intercourse between the first belligerent and neutrals. The rule that belligerents must not interfere with the legitimate commerce of neutrals presupposes that both belligerents will carry it out, and that neutrals will prevent both of them from violating it. If on the contrary, neutrals acquiesce in or are unable to prevent the violation of this rule by one belligerent to the vital disadvantage of the other belligerent, the latter cannot be expected to suffer this without redress, and must be excused if, in retaliating upon the enemy, he also violates the rule." Oppenheim, *supra* note 68, at 679.

"[T]he object of the Order [in Council Regulating a System of Passes for approved cargoes and ships of July 31, 1940] was, precisely, as a legitimate act of reprisals, to simplify the conduct of the blockade and to put increased pressure on the enemy." 10 M. Whiteman 906 (1968) (citing Fitzmaurice, *Some Aspects of Modern Contraband Control and The Law Of Prize*, 22 Brit. Yb. Int'l L. 73, 87-89 (1945)).

the enemy's ability to wage war.⁷⁷ The category of conditional contraband was enlarged to include everything except insignificant luxury items.⁷⁸ The difference between absolute and conditional contraband disappeared so that everything was subject to capture.⁷⁹ The doctrine of continuous voyage expanded to allow interdiction of what was once conditional contraband as well as absolute contraband.⁸⁰

B. Post-World War II Developments

1. North Korea Blockade

The blockade of North Korea marked a return to the classic form of the close blockade in that all legal requirements of establishment, notification, effectiveness, and impartiality were met.⁸¹ An announcement of the blockade of North Korea was broadcast on July 4, 1950, "to all shipping in the Pacific Ocean." Blockade lines extended 39 degrees-35 minutes North on the west coast, and 41 degrees-51 minutes North on the east coast of the Korean peninsula.⁸² These dimensions were established to circumvent confrontations with Soviet or Chinese vessels.⁸³ Officially designated "United Nations Blockading and Escort Force," the U.N. Naval Force was composed of vessels from ten nations, including the United States, Australia, Canada, Colombia, France, Thailand, Great Britain, the Netherlands, New Zealand, and the Republic of Korea.⁸⁴ The blockade of North Korea demonstrated, first, that a

77. Richard Grunawalt, *The Rights of Neutrals and Belligerents*, 19 *Ocean Dev. & Int'l L.J.* 299 (1988).

78. Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 *Mil. L. Rev.* 9, 43 (1980).

79. Boleslaw Adam Boczek, *Law of Warfare at Sea and Neutrality: Lessons from the Gulf War*, 20 *Ocean Dev. & Int'l L.J.* 239, 261 (1989). Before seizure, cargo must be determined to be bound for the enemy either directly or by transshipment.

80. *Id.*

81. Robertson, *supra* note 20, at 290.

82. Malcolm W. Cagle & Frank A. Manson, *The Sea War in Korea* 281 (1957). The notice stated, "The President of the United States, in keeping with the United Nations Security Council's request for support to the Republic of Korea in repelling the Northern Korean invaders and restoring peace in Korea, has ordered a naval blockade of the Korean coast." *Id.*

83. *Id.*

84. *Id.* at 294. Two blockade forces under Task Force 95 prevented passage of all ships to the ports of North Korea, including Soviet and Chinese warships, with the exception of nonbelligerent warships in order to reduce the possibility of confrontation with major powers. *Id.* Four ships operating in pairs from the 38th parallel to 41 degrees -50 minutes North on the east coast, and U.S. and U.K. carriers near the 39th parallel and shore patrols along the west maintained surveillance of the coastline once every twenty-

traditional close blockade was still feasible in regional conflicts notwithstanding modern technology, and second, that a blockade could be enforced effectively with national navies cooperating under an integrated command.

2. *Cuban Quarantine*

Professor Robertson states that the Cuban missile crisis "perhaps had the greatest influence on the further development of maritime interdiction" and finds, based on similarity of form, that the Persian interdiction "appears . . . to be patterned after the . . . 'quarantine.'"⁸⁵ The Cuban quarantine was necessitated by the installation in summer of 1962 of Soviet military equipment, including medium range ballistic missiles with a capable range of one thousand nautical miles, jet bombers, and Soviet support crews, in Cuba.⁸⁶ On October 23, 1962, the Council of the Organization of American States (OAS) met, and as the Provisional Organ of Consultation, adopted a resolution which "recommended" that "the member states . . . take all measures, individually and collectively including the use of armed force" to stop the transport of additional offensive weapons into Cuba.⁸⁷

Kennedy issued a presidential proclamation of a quarantine based on this resolution as permitted under Chapter VIII of the U.N. Charter rather than on the Article 51 inherent right of individual or collective self defense.⁸⁸ The Proclamation proclaimed the area of interdiction

four hours by sea. *Id.* at 303.

Although the possibility of overland supply existed, North Korea was denied supply through "(1) . . . deep-water shipping along the east coast; (2) . . . shallow-water coastal shipping on the west coast; (3) . . . deep-water shipping routes to the Asiatic seaport cities in China, Manchuria, and North Korea." *Id.* at 370. In addition, a continuous siege of the ports of Wonsan, Songjin, and Hungnam was accomplished. *Id.* at 370-71.

85. Robertson, *supra* note 20, at 296.

86. Neill H. Alford, Jr., *Modern Economic Warfare*, 1963 International Law Studies Vol. 56, 277 (1967). Additional missiles and supporting military equipment were being shipped to the Soviet Union by Cuba while intermediate range ballistic missile sites were being constructed. *Id.*

87. Robertson, *supra* note 20, at 291. The resolution is based on Arts. 3, 6, and 8 of the Rio de Janeiro Treaty of 1947. These articles permitted the taking of measures, including the use of force, in the event of any aggression against "the territory or sovereignty of an American state." Von Glahn, *supra* note 34, at 511.

88. Von Glahn, *supra* note 34, at 511. A strong defense of the action under Article 51 has been made by McDougal and others. See McDougal, *supra* note 35. Robertson, *supra* note 20, at 9. The defense is based on a right of anticipatory self-defense as part of an inherent right of self-defense which survives under Article 51 of the Charter. *Id.* Some commentators have argued that the ICJ interpretation of Article 51 of the Charter as requiring an armed attack for individual or collective self-defense would not allow the quarantine under the circumstances of 1962. However, the court specifically did not address the right of anticipatory self-defense. A.V. Lowe, *The Commander's Handbook on the Law of Naval Operations and Contemporary Law of the Sea*, 64 Naval War C. Int'l L. Stud. 109, 128 (Robertson ed. 1991); Robertson, *supra* note 20, at 292.

encompassed an area formed from a circle with a radius of five hundred miles centered on Havana and a second circle with a radius of five hundred miles centered on the eastern end of Cuba.⁸⁹

The Secretary of Defense was ordered to

employ land, sea and air forces [and to] interdict . . . prohibited material . . . [defined as] surface to surface missiles; bomber aircraft; bombs, air to surface rockets and guided missiles; war-heads for any of the above weapons; mechanical or electronic equipment to support or operate the above items; . . . for the purpose of effectuating this Proclamation.⁹⁰

Ultimately, the administration defended its action as not subject to the Article 53(1) requirement of Security Council authorization by arguing that as based on a resolution "recommending" action, armed force was not "obligatory" and not an enforcement action.⁹¹

Analyzing the concept on which the quarantine is based reveals the basis and, hence, legality of the form of Persian Gulf interception at least prior to, if not subsequent to, the authorization by the United Nations. The Pacific blockade provides for the quarantine, the precedent of a blockade operation, in time of peace. The quarantine operation differs from the Pacific blockade in at least two ways. First, the ships of a third state, the Soviet Union, as well as those of the target state, Cuba, were affected.⁹² Second, the quarantine was an "interdiction" of cargo, not vessels. As such, the quarantine is based conceptually on the law of contraband supported by the right of visit and search.⁹³

Clearly the Cuban quarantine was a limited, reasonable use of force, specific and selective in its objectives, and while it adequately com-

89. Robertson, *supra* note 20, at 291.

90. Interdiction of the Delivery of Offensive Weapons to Cuba, Proclamation No. 3504, Oct. 23, 1962, 3 C.F.R. 232, 233-34 (1959-63); Robertson, *supra* note 20, at 291.

91. Robertson, *supra* note 20, at 291-92 (citing Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 Am. J. Int'l L. 515 (1967)); See also John Norton Moore, *Law and the Indo-China War* 334 (1972) [hereinafter Moore, *The Indo-China War*].

92. Von Glahn, *supra* note 34, at 508. See Robertson, *supra* note 20, at 292. However, interdicting the vessels of the Soviet Union was reasonable because the Soviet Union was one of the parties to the dispute.

Dispute exists regarding the lawfulness of hindering passage of the vessels of a third nation. Lauterpacht maintains that there exists agreement that the vessels of third states may not be seized and sequestered; however, "no unanimity exists" regarding whether the ships of a third state may be stopped. Oppenheim, *supra*, note 68, at 147.

93. Further, as Janis argues, "the point is that doctrine and practice no longer try to decide what is formally 'war' and what is formally 'peace.' There are simply conflicts between nations which involve the use of force and/or economic sanctions." Mark W. Janis, *The Law of Naval Operations: Neutrality*, 64 U.S. Naval War C. Int'l L. Stud. 148 (1981).

municated to the Soviet Union and Cuba an intent not to wage war, it also was the first of a possible series of escalating measures.⁹⁴

3. *Blockade of North Vietnam*

The mining of North Vietnam's harbors marked a return to the traditional blockade except that mines were used as the enforcement device. During the Tet Offensive, the North Vietnamese were unable to resupply effectively from South Vietnam's coastal waters because of "Operation Market-Time," a military course of action in which a defensive sea zone was patrolled jointly by the U.S. Navy and the South Vietnamese, forcing a greater North Vietnamese dependence on overland supply via the Ho Chi Minh Trail. After fierce attack from the North and the refusal of Le Duc Tho to negotiate in Paris, Nixon ordered the mining of Haiphong Harbor and other North Vietnamese harbors to prevent the flow of "Soviet supplies at the source."⁹⁵

On May 8, 1972, squadrons of A-6s from three carriers sowed mine fields in Haiphong, Hon Lai, and Can Pha in the North and Thanh hoa, Vinh Quang Khe, and Dong Hoi in the South.⁹⁶ The mining of the harbors was effective. Vice Admiral William P. Mack, Commander of the U.S. Navy's Seventh Fleet stated, "What happened was that all that traffic into Vietnam, except across the Chinese border stopped. Within ten days there was not a missile or a shell being fired at us from the beach. The North Vietnamese ran out of ammunition, just as we always said they would."⁹⁷

The U.S. Navy's instructional manual, *Law of the Sea and Law of Naval Warfare*, describes the "textbook" legality of this operation stating,

The following precautions . . . were taken by the United States: in an address on 3 May the [P]resident announced details of the mining; notices were issued to all mariners; a letter was sent to the U.N. Security Council; and bilateral approaches were made through diplomatic channels to countries concerned. Each of these communications detailed the protective measures taken, which included the facts that delayed-activation mines only were to be used so that ships in Vietnamese harbors had three days in which to leave, and U.S. and Republic of Vietnam warships were to notify each ship approaching the internal and claimed

94. Bruce A. Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device* 27 JAG J. 160 (1973).

95. P. Mersky & Norman Polmar, *The Naval Air War in Vietnam 198-99* (1981).

96. *Id.*

97. *Id.*

territorial waters of North Vietnam. In addition, no mines were laid in international waters and the mining did not bar access to or departure from neutral coasts.⁹⁸

Much controversy existed regarding the use of mines to enforce the blockade. However, the extremely limited nature of the blockade counterbalanced the lack of selectivity and discrimination in targeting.⁹⁹ The extensive notification of the blockade, the grace period, and the confinement of mines to the harbors and territorial waters of North Vietnam ensured that any challenge of the blockade was on an informed and voluntary basis.¹⁰⁰ The deterrent effect of the operation was so successful that all shipping ceased with no injury to life or property reported during the operation.¹⁰¹ This demonstrates that highly destructive means of enforcement may be acceptable and lawful if other aspects of the blockade limit the likelihood of destruction.

4. Blockade of Iran-Iraq War

The Iran-Iraq War brought attention once again to the use and meaning of war zones and exclusion zones. After the start of the war on September 22, 1980, Iran declared an exclusion zone which encompassed virtually the whole of the Iranian coast on the eastern coastline of the Persian Gulf.¹⁰² In response Iraq established a "prohibited war zone" north of 29 degrees-3 minutes North in the Persian Gulf, along Iran's northern coastline, and within the lines of the Iranian exclusion zone with all ships in the vicinity of Kharg Island subject to attack.¹⁰³ The zones were utilized by each to wage economic warfare on the other. In order to disrupt oil exports from Iran, on which the Iranian economy is heavily dependent, Iraq attacked ships in the northern end of the Persian Gulf largely within the declared war zone from 1981 until 1984

98. Naval Justice School, *supra* note 62, at 65. Horace Robertson notes that the use of mines as an "enforcement device" might violate the "principle of distinction" in that damage would be incurred by vessels regardless of nationality or cargo. He argues, however, that because of the extensive warning, no neutral vessel would have entered the mined waters without choice. Robertson, *supra* note 20, at 292.

99. Clark, *supra* note 94, at 160.

100. *Id.*

101. Mersky & Polmar, *supra* note 95, at 198-99.

102. Robertson, *supra* note 20, at 293. The area is described as running "from the Strait [of Hormuz] to 12-NMs South of each of Abu Musa Island, Sirri Island, Cable Bank Light, and Farsi Island, then Southwest of Kharg Island along fixed points." Francis V. Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 *Ocean Dev. & Int'l L.J.* 381, 389 (1988).

103. *Id.* at 390.

and, subsequent to 1984, neutral ships traversing the northern end of the Persian Gulf to and from Kharg Island.¹⁰⁴ Iraq's terminals had been destroyed by Iran prior to 1980, and there had been little commercial shipping from Iraq since that time. Iran, for a lack of Iraqi shipping targets, instead indiscriminately attacked neutral ships traveling to and from neutral states.¹⁰⁵ Further, the Iranian attacks were not confined to any exclusion or war zones and tended to concentrate in the southern end of the Persian Gulf outside of the Iranian declared exclusion zone.¹⁰⁶ The indiscriminate attack and destruction of neutral shipping by both countries, particularly Iran, and the mining of international shipping lanes by Iran, show a total disregard for the international law rights of neutrals.¹⁰⁷

The Tanker War is significant regarding maritime interception in two areas. First, the United Nations Security Council acknowledged the rights of neutral nations to engage in shipping when the Security Council has not denominated an aggressor. Further, according to theorist Francis Russo, Jr., Security Council resolutions establish a "baseline standard" that "all neutral [third-party state] commercial vessels engaged in legitimate trade with states not parties to the hostilities—whether neutral or non-belligerent—are treated as enjoying equal legal immunity from belligerent attack."¹⁰⁸

Commentators draw a distinction between the traditional neutral state and the merely non-belligerent or "state not a party to the hostilities."¹⁰⁹ During World War II different degrees of support were given by nonparticipants to belligerents, ranging from absolute non-involvement to active support without actual engagement in hostilities.¹¹⁰ Members of the Gulf Cooperation Council, notably Kuwait and Saudi Arabia, supported Iraq by financing its war with Iran.¹¹¹ Cash grants used to purchase Soviet arms were allocations of profit derived from oil exports.¹¹² Kuwait and Saudi Arabia were not neutral in their financial

104. W.J. Fenrick, *The Exclusion Zone Device and the Law of Naval Warfare*, 24 *Can. Y.B. Int'l L.* 119 (1986). See Robertson, *supra* note 20, at 293.

105. Fenrick, *supra* note 104, at 119. See Robertson, *supra* note 20, at 293-94.

106. Russo, *supra* note 102, at 390.

107. *Id.* David L. Peace, *Major Maritime Events in the Persian Gulf*, 82 *Am. Soc'y Int'l L. Proc.* 146, 153 (1988).

108. See Russo, *supra* note 102, at 381, 396 for discussion of these points.

109. "State and extra-state practice in the Gulf War has also reaffirmed for genuine intraneutral shipping (i.e., that between third party States outside the Gulf and those Gulf states not parties to the hostilities, which does not in any case directly enhance the economic war strength of one or the other belligerents) a right of privileged states that strictly limits the circumstances under which belligerent interference with it will be accorded legitimacy." Russo, *supra* note 102, at 381.

110. Boczek, *supra* note 79, at 259.

111. *Id.*

112. Russo, *supra* note 102, at 393.

support of Iraq, even though they did not actually participate in hostilities. In calling for protection of shipping of third party nations to and from these states, the Security Council Resolutions 540, 552, and 582 do not distinguish between rights "which may be enjoyed by ships trading with states that are neutrals in the traditional sense and states pursuing a policy of non-belligerency."¹¹³

Second, the right of visit and search was reaffirmed. Iran asserted the right of visit and search from 1985 to 1988, stopping as many as fifteen to twenty vessels a day.¹¹⁴ The United States did not deny the right of visit and search to Iran, but convoyed U.S. shipping and eleven reflagged Kuwaiti vessels.¹¹⁵ France "resisted" the visit and search attempts by Iran, while Great Britain, refusing to recognize visit and search as a belligerent right, conceded the right to visit and search.¹¹⁶ The British conceded the right under Article 51 of the U.N. Charter stating,

Iran, actively engaged in an armed conflict, is entitled in exercise of its inherent right of self-defense to stop and search a foreign merchant ship on the high seas, if there is a reasonable ground for suspecting that the ship is taking arms to the other side for use in the conflict.¹¹⁷

The British, consistent with their previous position opposing the right of convoying warships to deny a physical visit and search to a belligerent, allowed visit and search even though British warships "accompanied," but did not "escort" British flag ships.¹¹⁸

IV. PERSIAN GULF INTERCEPTION

A. *Facts of the Kuwaiti-Iraqi Crisis*

On August 2, 1990, Iraqi troops crossed the Kuwait-Iraqi border, plundered and ransacked the country, installed a "Provisional Free Government of Kuwait," and remained to occupy Kuwait based on an "invitation" allegedly issued to Iraq by the "Free Provisional Govern-

113. *Id.* at 395.

114. Boczek, *supra* note 79, at 260.

115. Robertson, *supra* note 20, at 293. Rather than submit to visit and search, these convoying nations would have the convoying warship inspect and certify the lack of contraband to the party attempting the visit and search. *Id.*

116. *Id.*; Grunawalt, *supra* note 77, at 159.

117. Robertson, *supra* note 20, at 293-94 (citing Christopher Greenwood, *Remarks at the 82nd Annual Meeting*, Am. Soc'y Int'l L. Proc. 158, 159 (1988)).

118. Russo, *supra* note 102, at 16; Robertson, *supra* note 20, at 293.

ment of Kuwait."¹¹⁹ The world reaction was immediate and intense. The Security Council met before dawn on August 2 to adopt Resolution 660 which "condemned the Iraqi invasion" of Kuwait, "demanded" that Iraq withdraw "immediately and unconditionally" from Kuwait, and called upon Iraq and Kuwait to "begin immediately intensive negotiations to resolve their differences."¹²⁰

On August 6, the Security Council adopted Resolution 661 which imposed comprehensive and mandatory sanctions on Iraq.¹²¹ The purpose of Resolution 661 was "to secure compliance of Iraq with Resolution 660 calling for the withdrawal of Iraqi forces" and "to restore the authority of the legitimate government of Kuwait."¹²² A total embargo was imposed on Iraq with an exemption explicitly included for "medical supplies and, in humanitarian circumstances, foodstuffs."¹²³ Notably, the resolution in its preamble affirms "the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter" and, in paragraph 9, states that "nothing in the present resolution shall prohibit assistance to the legitimate Government of Kuwait."¹²⁴

On August 16, 1990, the United States announced that U.S. forces were commencing intercept operations to challenge ships in enforcement of U.N. Security Council Resolution 661. By letter to the President of the Security Council, the United States informed the Security Council that the U.S. military forces "at the request of the Government of Kuwait" had joined Kuwait "to intercept the vessels seeking to engage in trade with Iraq or Kuwait in violation of the mandatory sanctions imposed in Security Council resolution 661."¹²⁵ These actions were taken "in the exercise of the inherent right of individual and collective self-defense, recognized in Article 51 of the Charter."¹²⁶ Further the letter informs the Security Council that the United States will "use force only if necessary and then only in a manner proportionate to prevent vessels from violating such trade sanctions contained in Resolution 661."¹²⁷ A

119. *U.N. Acts*, U.N. Chron., at 9, 10 (Dec. 1990). For comprehensive chronology of events, see Robertson, *supra* note 20, at 294-97; Moore, *Enforcing the Rule of Law*, *supra* note 34, at 100-08.

120. U.N. Doc. S/RES/660 (1990).

121. U.N. Doc. S/RES/661 (1990).

122. *Id.*; *U.N. Acts*, *supra* note 119, at 12.

123. *Id.*

124. *Id.*

125. Letter from the Charge d'affaires a.i. of the United States Mission to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21537 (1990), reprinted in *The Kuwait Crisis—Basic Document 247* (E. Lauterpacht et al. eds, 1991) [hereinafter Letter from the Charge d'affaires].

126. *Id.*

127. *Id.*

U.S. Department of Defense press release of the same date indicated in addition that this was a multinational effort and that intercept operations would be concentrated "in specified zones in the Persian Gulf, the Gulf of Oman, and the Red Sea."¹²⁸

These announcements were followed on August 17 by Special Warning No. 80 issued by the U.S. Department of the Navy. The Special Warning describes the interception operation as follows:

2. Effected [sic] areas include the Strait of Hormuz, Strait of Tiran, and other choke points, key point ports, and oil pipe line terminals. Specifically, Persian Gulf interception efforts will be concentrated in international waters south of 27 degrees north latitude; Red Sea interception efforts will be conducted in international waters north of 22 degrees north latitude.

3. All merchant ships perceived to be proceeding to or from Iraqi or Kuwaiti ports, or transshipment points, and carrying embargoed material to or from Iraq or Kuwait, will be intercepted and may be searched.

4. Ships which, after being intercepted, are determined to be proceeding to or from Iraq or Kuwait ports, or transshipment points, and carrying embargoed material to or from Iraq or Kuwait, will not be allowed to proceed with their planned transit. . . .

7. Failure of a ship to proceed as directed will result in the minimum level of force necessary to ensure compliance.

8. Any ships, including waterborne craft and armed merchant ships, or aircraft, which threaten or interfere with U.S. forces engaged in enforcing this maritime interception will be considered hostile.¹²⁹

Great Britain notified the Security Council that exercising "the inherent right of individual and collective self-defense recognized in Article 51," the British Government had deployed military forces to the Gulf.¹³⁰ By August 15, Great Britain and Australia had agreed to join the United

128. U.S. Department of Defense, press release concerning naval interdiction, Aug. 16, 1990; U.S. Department of Defense, Desert Shield No. 10, memorandum for correspondence, Aug. 16, 1990, *reprinted in* Kuwait Crisis: Basic Documents, *supra* note 125, at 247 [hereinafter Desert Shield memorandum].

129. U.S. Department of the Navy, Special Warning No. 80, Aug. 17, 1990, *reprinted in* Kuwait Crisis: Basic Documents, *supra* note 125, at 245 [hereinafter Special Warning].

130. Letter from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/21501 (1990), *reprinted in* Basic Documents, *supra* note 125, at 248.

States in intercepting and boarding ships suspected of violating Resolution 661.¹³¹ On the other hand, France, Malaysia, the Soviet Union, and Canada were not supportive of the interception operation. These nations argued that, because interception could require use of force, the interception should be undertaken by the Security Council only.¹³² Further, France and Canada did not wish to become "co-belligerents" with those nations conducting the interception.¹³³ Perhaps most damaging was the statement by U.N. Secretary-General Perez de Cuellar that the lawfulness of the interception "would depend on whether the action taken by the American government had been approved by the Security Council."¹³⁴

Most criticism was quelled by the adoption of Resolution 665 on August 25, 1990, which endorsed the naval interception operation in the Persian Gulf. By this resolution, the Security Council "called upon [states] cooperating with the Gulf government of Kuwait which are employing maritime forces to the area [to] use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations" so that Resolution 661 would be strictly implemented.¹³⁵ The resolution further "requests" states to provide "assistance as may be required" by those states conducting the interception.¹³⁶ Even though interpretation of Resolution 665 differs among even the Security Council members, the interception was clearly authorized by the Security Council under its Chapter VII powers.¹³⁷

131. Olivia Ward, *Who Will Command the Foreign Forces Gathering in Gulf?*, The Toronto Star, Aug. 15, 1990, at A3.

132. Olivia Ward, *Only UN Had Right to Call for Blockade, Canada Declares*, The Toronto Star, Aug. 14, 1990, at A3.

133. Paul Lewis, *Confrontation in the Gulf*, N.Y. Times, Aug. 13, 1990, at 9; Ward, *supra* note 131, at A3.

134. Paul Lewis, *U.N. Chief Argues Blockade Is Hasty*, N.Y. Times, Aug. 17, 1990, at A12.

135. U.N. Doc. S/RES/661 (1990).

136. *Id.*

137. Elaine Scioliono, *Putting Teeth in an Embargo: How the U.S. Convinced the U.N.*, N.Y. Times, Aug. 30, 1990, at A1. (China interpreted the resolutions as not authorizing force).

Resolution 666 adopted by the Security Council on September 13, 1990, established a sanctions committee composed of the members of the U.N. Security Council to monitor any shortage of food in Iraq and Kuwait and the needs of those who might be specially effected including children under the age of fifteen, pregnant women, new mothers, and the sick and the elderly. *Council Acts on Hunger and Suffering*, U.N. Chron., at 18 (Dec. 1990). U.N. Doc. S/RES/666 (1990), *reprinted in* Kuwait Crisis: Basic Documents, *supra* note 125, at 91.

In endorsing the interception operation, the Security Council charted a new path in Chapter VII of the U.N. Charter and provided a precedent, if not a model, for future sanction operations under Chapter VII. Nations, regional organizations, and the United Nations are turning increasingly to sanctions in order to enforce international law and redress international wrongs.

B. *Lawfulness of the Persian Gulf Interception*

The interception as initially established by the United States on August 16, 1991, and subsequent to its endorsement by the Security Council under Resolution 665 was undertaken properly as a measure of collective self-defense under Article 51 of the U.N. Charter.¹³⁸ The Security Council lawfully endorsed the interception by Resolution 665 in accordance with U.N. Charter provisions.¹³⁹ Professor John Norton Moore finds that "[n]ecessity . . . is paradigmatically met in a setting in which aggression is aimed at the separate existence of an independent member nation of the United Nations and that entire nation is under brutal occupation."¹⁴⁰ Sanctions were strongly supported by the world community as necessary and appropriate. If the imposition of sanctions is proportional, then it follows that sanctions which are firm are proportional.¹⁴¹ Proportionality is established further by the limited nature of the interception operation. The interception activities were designed strictly to enforce the sanctions and to use as coercion an intimidating threat of force with limited use of disabling force as a last resort.

The interception, as initially established by the United States on August 16, 1991, and as endorsed by the Security Council under Resolution 665, complied and continues to comply with applicable principles of international law regarding maritime zones in hostile settings. Resolution 665 places no restrictions on the form of the interception except to require that "all inward and outward maritime shipping" shall be halted "to inspect and verify cargoes and destinations" with the proportionality requirement that only "measures commensurate to the specific circumstances as may be necessary" be applied.¹⁴² Form and use of force were otherwise left to the discretion of the participating nations. Lauterpacht implies that because of obligations of both member and

138. Moore, *Enforcing the Rule of Law*, *supra* note 34, at 100-08; see Letter from the Charge d' Affaires, *supra* note 125 ("These actions are being taken by the United States in the exercise of the inherent right of individual and collective self-defense, recognized in Article 51 of the Charter").

139. Moore, *supra* note 34, at 100-08.

140. *Id.* at 106.

141. *Id.*

142. U.N. Doc. S/RES/665 (1990).

non-member states, a naval operation established under Chapter VII of the U.N. Charter is not required to conform to the strictures of blockade or other traditional forms of maritime zones.¹⁴³ Regardless, the form of interception imposed in the Persian Gulf initially by the United States and endorsed by the United Nations is a more limited, less intrusive naval operation than the traditional visit and search, blockade, or Pacific blockade and complies with international law.

The interception was not a blockade for its objective was not to block the enemy coast "for the purpose of" preventing ingress and egress of vessels."¹⁴⁴ The interception was directed at cargo, not ships, and may be considered a use of the right of visit and search in the further development of the law of contraband.¹⁴⁵ The requirements for a lawful blockade struck a balance between the rights of belligerents and the rights of neutrals and restricted the blockade to as limited an infringement of freedom of the seas as possible while still allowing an effective action. The recent concept of interception strikes a balance between freedom of the seas and interference which favors nonprohibited shipping to an even greater degree. The interception is, in form, at least as limited in its restrictions on traditional high seas freedoms as blockade and related naval operations.¹⁴⁶ Rather than being captured, vessels carrying prohibited cargo were diverted to nonprohibited ports. Vessels were allowed to sail to "transshipment points" as long as adequate documentation of cargo proved that the cargo was not destined for Kuwait or Iraq.¹⁴⁷

As allowed by the concept of Pacific blockade and as in the case of the Cuban quarantine, the interception was not asserted as an act of war, but was intended to settle differences outside of war. However, unlike the interception, Pacific blockade allowed vessels of the state under Pacific blockade to be "seized and sequestrated" to be "restored" at the end of the blockade.¹⁴⁸

143. Oppenheim, *supra* note 68, at 149.

144. *Id.* at 768.

145. Robertson sets forth two major concepts in naval warfare: blockade and contraband. Robertson, *supra* note 65, at 733.

146. Alford finds that "the legitimacy" of an act is a product of persuasion since the collection of values and institutions we describe as law are in a process constantly of reconstruction." Alford, *supra* note 86, at 292.

147. Delery, *supra* note 1, at 66.

148. Oppenheim, *supra* note 68, at 148. Although unclear, some theorists assert the blockading state could lawfully "stop" the vessels of third nations. Lauterpacht sets forth certain requirements for Pacific blockade. Negotiations to settle the dispute must fail. The blockading state must notify its intention to blockade the target state and set forth the day and hour of its commencement. Finally, Pacific blockades must be effective. *Id.* at 148-49.

The Persian Gulf interception process itself indicates that the measures undertaken to enforce the interception satisfy the "commensurate with the specific circumstances" standard to halt shipping.¹⁴⁹ Controls were built into the process to allow the minimum possible application of force needed. Basically, vessels intercepted departing Iraq with "prohibited cargo" were required to return to Iraq. Those vessels attempting to reach Iraq with "prohibited cargo" were allowed to "return to their ports of origin or select non-prohibited ports."¹⁵⁰ The "quick, rather painless process" used in the Persian Gulf interdiction is briefly described as follows:

1. The intercepted vessel is asked to respond concerning "its registration, cargo, and ports of call."¹⁵¹
2. If carrying "prohibited cargo" to Iraq, the vessel is "given the option of diverting to a port other than one in Iraq . . . in lieu of being boarded and searched."¹⁵²
3. If the vessel refuses to divert and refuses to be boarded, then SEAL and Marine teams will "board and secure" the merchant vessel.¹⁵³

This is accomplished by having a frigate from the allied force "try to force the vessel to slow" by maneuvering "across her bow." Warning shots are fired in sequence across the bow of the resisting vessel. Low-level passes are made by F-14 and F/A-18 aircraft. If this fails, then a helicopter gunship will provide fire cover while a team of Marines will be placed on board by a second helicopter.¹⁵⁴

4. A boarding team will then approach in small boats and board the vessel.¹⁵⁵ "Special team" Coast Guard Law Enforcement Detachments ("LEDETS") trained in the "boarding and search" process are a part of this team.¹⁵⁶

5. If the "embarking team" finds prohibited cargo on board and the ship's master refuses to divert, then the boarding team

149. Ambassador Al-Ashtal of Yemen criticizes the latitude given under the resolution saying, "According to the wording of the draft resolution, every maritime state with a presence in the area would have the right to undertake whatever acts it deems fit, and I believe that this could detract from the Security Council's role of directing and supervising such acts. . . . For these reasons, we cannot vote in favour of the draft resolution" Statement of Amb. Al-Ashtal, U.N. Doc. E. S/PV.2938 (1990), *reprinted in* The Kuwait Crisis: Basic Documents, *supra* note 125, at 116.

150. Delery, *supra* note 1, at 66.

151. *Id.* at 67.

152. *Id.*

153. *Id.* at 68.

154. *Id.*

155. *Id.* at 71.

156. *Id.* at 68.

will "take control of the ship and force its diversion to another port."¹⁵⁷

These measures are described by Commander Delery, one of several MIF officers assigned to the staff of Commander Middle East Force, as having "precluded the use of crippling force."¹⁵⁸ Even though a total of 12,648 vessels have been challenged to date, disabling fire has never been used and no ships have been disabled.¹⁵⁹

Resolution 665, paragraph 1 calls on intercepting forces "to halt all inward and outward maritime shipping" The Security Council does not specify the area where interception may take place.¹⁶⁰ However broad the latitude given to participating nations under Resolution 665, by Special Warning No. 80, the United States specifically and precisely identified the area of operations upon its August 16, 1990, unilateral imposition of the maritime interception to

include the Strait of Hormuz, Strait of Tiran, and other choke ports, key ports and oil pipeline terminals. Specifically Persian Gulf interception efforts will be concentrated in international

157. *Id.*

158. *Id.* at 71. Lauterpacht acknowledges that not "all the details of" the formalities of visit and search are established in international law, but state practice has been consistent on numerous points. The U.S. Navy's Commander's Handbook sets forth a procedure similar to that ascertained by Lauterpacht as follows:

2. Before summoning a vessel to lie to, the warship should hoist its national flag. The summons is made by firing a blank charge, by international flag signal . . . or by recognized means. . . .
3. If the summoned vessel takes flight, she may be pursued and brought to by forcible measures if necessary.
4. When a summoned vessel has been brought to, the warship should send a boat with an officer to conduct the visit and search. . . . The officer(s) and boat crew may be armed at the discretion of the commanding officer.
5. If visit and search at sea is deemed hazardous or impracticable, the neutral vessel may be escorted by the summoning of another U.S. Navy warship or by a U.S. military aircraft to the nearest place (outside neutral territory) where the visit and search may be conveniently and safely conducted. . . .
6. The boarding officer should first examine the ship's papers to ascertain her character, ports of departure and destination, nature of cargo, manner of employment, and other facts deemed pertinent. . . .
7. Regularity of papers and evidence of innocence of cargo, employment or destination furnished by them are not necessarily conclusive, and, should doubt exist, the ship's company may be questioned and the ship and cargo searched. . . .

Commander's Handbook, *supra* note 22, at 7.7.3.1.

159. U.S. Central Command, Diversion Summary (Jan. 10, 1992).

160. U.N. Doc. S/RES/665 (1990). By use of the language "member states . . . which are deploying maritime to the area," the Security Council impliedly indicates the area of interception to be the area within which maritime forces have been deployed to defend Kuwait.

waters south of 27 degrees north latitude; Red Sea interception efforts will be conducted in international waters north of 22 degrees north latitude.¹⁶¹

However, the Pentagon did not foreclose the possibility of "enforcement action in other parts of the region"¹⁶² It is clear the surveillance and monitoring of shipping was not limited to the area specified in the Notice to Mariners but extended "from the North Arabian Gulf, south through the Arabian Sea, and the full length of the Red Sea."¹⁶³

The choke points of the Strait of Hormuz and the Straits of Tiran facilitate the interception of maritime traffic bound for the ports of Iraq and the Port of Aqaba in Jordan respectively.¹⁶⁴ Choke points have been referred to as strategic straits which, because of geographic features, permit an opportunity to cut off or restrict maritime commercial traffic to a state or group of states.¹⁶⁵ Surveillance and monitoring operations were required beyond the area listed in the Notice to Mariners and beyond the natural choke points of the Strait of Hormuz and the Straits of Tiran in order "to allow time for boarding-party preparations, to keep vessels from evading boarding by running for nearby territorial waters, and to facilitate advanced coordination with other navies"¹⁶⁶ Monitoring activities took place as well in the Mediterranean Sea.¹⁶⁷

161. Special Warning, *supra* note 129.

162. Michael Gordon, *Navy Begins Blockade Enforcing Iraq Embargo*, N.Y. Times, Aug. 17, 1990, at A10 (statement of Williams, Pentagon Spokesperson).

163. Delery, *supra* note 1, at 68.

164. *Id.*

165. Lewis M. Alexander & Joseph R. Morgan, *Choke Points of the World Ocean: A Geographic and Military Assessment*, 7 Ocean Yearbook 340 (1988). The authors list three basic criteria for defining choke points:

[First,] there are no readily available alternative maritime routes to use. Second, these areas are significant to the interests of particular states in terms of the nature and volume of commercial and military traffic, including aircraft, which they handle. Third, passage through these choke points must be capable of being effectively blocked by one or more countries.

Id.

166. Delery, *supra* note 1, at 66. "Intercepting prohibited cargoes en route to and from Iraq involves much more than monitoring a few maritime choke points. The Multinational Interception Force has had to maintain surveillance operations from the North Arabian Gulf, through the Arabian Sea, and along the full length of the Red Sea." *Id.*

167. R.W. Apple, *Ships Turn Away from Ports as Iraq Embargo Tightens; U.S. Military Force Pours In; Americans Escape*, N.Y. Times, Aug. 14, 1990, at A1 ("In Washington, government officials said they were monitoring the movement of a Polish merchant ship, now in the Mediterranean Sea, headed to Iraq with a cargo that might include weapons."). *Id.* "Tonight, instructions formally putting into effect the American led naval blockade . . . were issued by the Pentagon to United States warships, in the Red Sea, the Persian Gulf, the Mediterranean Sea, and the Arabian Sea." R.W. Apple, *Confrontation in the Gulf: Jordan on Embargo; Teheran to back Sanctions; New Threat*

The lack of designation of the specific area for interception activities in Resolution 665 allows the states acting unilaterally to determine the area of operation most useful and efficient for their purposes. Resolution 665 is consistent with the traditional laws of war which permit visit and search to take place in any area of the sea except for "the maritime territorial belt of neutrals."¹⁶⁸ It is immaterial whether the merchant vessel "is near or far away from that part of the world where hostilities are actually taking place, . . . so long as there is suspicion against the vessel."¹⁶⁹

C. Territorial Seas

Under the traditional concept of the right of visitation, the issue of whether a belligerent could undertake visit and search activities within the territorial waters of third parties in addition to the territorial waters of the enemy "is solely one between the belligerent and his ally, provided that the latter is already a belligerent."¹⁷⁰ Therefore, as long as an ally gave permission to a belligerent to engage in visit and search activities within its territorial waters, the belligerent could resort to such activities in that area. This limitation is observed in the Commander's Handbook, which indicates that belligerents must "refrain from all acts of hostility in neutral territorial waters . . ."¹⁷¹ Ronzitti takes the position that state practice has been to limit naval operations to the territorial waters and areas adjacent to the coast of belligerents.¹⁷²

Made in Kuwait; Peace Hope Fading, N.Y. Times, Aug. 17, 1990, at A1 ("The United States is continuing to monitor an Iraqi vessel in the Mediterranean . . ."). Michael R. Gordon, *Navy Begins Blockade Enforcing Iraq Embargo*, N.Y. Times, Aug. 17, 1990, at 10 ("Another Iraqi ship under surveillance in the mediterranean is loaded with tank engines . . ."). Eric Schmitt, *U.S. Intercepts and Frees Two Iraqi Ships*, N.Y. Times, Aug. 18, 1990, at 4.

168. Oppenheim, *supra* note 68, § 415, at 848.

169. *Id.* "The prohibition against visit and search and neutral territory extends to international straits overlapped by neutral territorial seas and archipelagic sea lanes." The Commanders Handbook, *supra* note 22, at 7.6.

170. Oppenheim, *supra* note 68, § 415, at 849.

171. The Commander's Handbook, *supra* note 22, at 7.3.4. "Neutral territorial seas . . . must not be used by belligerent forces either as a sanctuary from their enemies or as a base of operations." *Id.* The only acts of hostilities permitted in neutral territorial waters are "those necessitated by self defense or undertaken as self help enforcement actions against enemy forces that are in violation of the neutral status of those waters when the neutral nation cannot or will not enforce their inviolability." *Id.*

172. Ronzitti bases this on a review of naval operations in the Arab-Israeli conflict, the Vietnam war, the Indo-Pakistani war, and the Iran-Iraq war. Ronzitti finds "it is difficult to say whether this practice is dictated by a legal conviction to do so or by considerations of advantage as, for instance, when belligerents have limited naval capa-

U.S. Naval warships as well as other military vessels of the interception force are allowed at least a right of innocent passage through the territorial seas of neutral states.¹⁷³ Passage which is "not prejudicial to the peace, good order or security of the coastal state" is considered innocent.¹⁷⁴ Passage must "be continuous and expeditious."¹⁷⁵ A laundry list of activities considered prejudicial is given under Article 19 of the 1982 Law of the Sea Convention including "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal state" and "any other activity not having a direct bearing on passage."¹⁷⁶ While, without permission, interceptions could not take place within the territorial sea of nonbelligerent littoral states, theoretically the monitoring or surveillance activities could be conducted within the territorial sea area so that vessels could be tracked. Passage is judged by acts undertaken within the territorial sea, so the fact that interception was the ultimate objective of the tracking vessel would not be prejudicial. Professor Robertson has indicated that "the cargo, destination, or purpose of the voyage" is not determinative of innocent or non-innocent passage.¹⁷⁷

U.S. Naval interception operations were consistent with the traditional right of visit and search, the 1982 Law of the Sea Convention, and visit and search procedure set forth in the Commander's Handbook.¹⁷⁸ U.S. Naval forces did not intercept vessels in the territorial seas of non-belligerent littoral states without permission from the littoral state concerned, yet did have the ability to engage in interception activities in the territorial seas of non-belligerent littoral states with permission of the littoral state concerned.¹⁷⁹ Clearly, Iraqi vessels and others violating

bility." Ronzitti, *The Crisis in the Law of Naval Warfare*, *supra* note 45, at 5.

The littoral states in the Persian Gulf claim territorial seas of twelve nautical miles. By 1959, Saudi Arabia and Iraq claimed territorial seas of twelve nautical miles. Kuwait claimed a twelve-nautical-mile territorial sea in 1967, Sharjah claimed a twelve-nautical-mile territorial sea in 1970, and Oman claimed a twelve-nautical-mile territorial sea in 1972. No gulf states claimed territorial seas beyond twelve miles.

173. 1982 U.N. Convention on the Law of the Sea, art. 17.

174. *Id.* at Art. 19 (1).

175. *Id.* at Art. 18 (2).

176. *Id.* at Art. 19(2)(a) and (l).

177. The Annotated Supplement to the Commanders Handbook, *supra* note 21, at 2.3.2.1 n.26 (citing *Law of the Sea Status of the Law of the Sea Treaty Negotiations: Hearings on Ser. No. 97-29 Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries*, 97th Cong., 1st Sess. 413-14 (1982) (testimony of H.B. Robertson, Prof. of Law, Duke University)).

178. Commander's Handbook, *supra* note 22, at 7.7.1.

179. Telephone interview with Commander Michael Hinkley JAGC, USN, assigned as Force Judge Advocate to Commander Middle East Force on board the flagship *USS La Salle* in the Persian Gulf from September 1989 until August 1991 (Oct. 28, 1991).

the embargo considered territorial seas of Iran to be a safe haven.¹⁸⁰ Repeatedly, vessels attempted to escape boarding by entering territorial seas.¹⁸¹ Iran vociferously protested use of its airspace or territorial waters by the MIF and Iraq and repeatedly notified the Security Council of a number of what it considered violations of its territorial sea and air space.¹⁸²

The information regarding which states gave permission for the U.S. Navy or other coalition forces to intercept within their territorial seas or whether any interception operations actually took place within the territorial seas of such states remains classified.¹⁸³ However, President Bush publicly thanked the Republic of Djibouti for "opening its airfields, its sea ports, its territorial waters to allies"¹⁸⁴

Resolution 665 "requests all States to provide in accordance with the Charter such assistance as may be required by the States" enforcing the sanctions by participating in the interception.¹⁸⁵ Conceivably, this request required all states to allow interception activities to take place within their territorial seas as needed. In fact, binding resolutions, specifically "those of the Security Council pursuant to Chapter VII of the United Nations Charter, . . . have the effect of law for members of

180. The territorial seas of Iraq and Kuwait could be used for interception activities under the traditional laws of war. Commander's Handbook, *supra* note 22.

181. Delery, *supra* note 1, at 67. *The Al Khanaqin* consequently attempted to escape interception by entering Omani territorial waters. *Id.*

U.S. Navy vessels monitored an Iraqi oil tanker until it reached Yemeni waters, indicating interception activities could not take place within the territorial seas of Yemeni. *MacNeil NewsHour* (Report of MacNeil, PBS television broadcast, Aug. 22, 1990).

The Iraqi oil tanker *Al Khanaqin* reportedly attempted to evade interception by sailing in Iranian territorial waters.

182. Iran transmitted perceived violations by means of notes verbales with the request that the message be transmitted to the U.S. State Department and Iran be "informed of the response." See U.N. Doc. S/21902 Annex I, Enclosure, Annex II, Annex III, Enclosure (1990); U.N. Doc. S/21903 Annex 1, Enclosure, Annex II, Enclosure (1990); U.N. Doc. S/21904 (c) Annexes I, II, III, IV with enclosures (1990); U.N. Doc. S/21905 (c) Annexes I, II, III, IV, and V with enclosures (1990).

J. Michael Kennedy & John M. Broder, *Allies Drive Iraqis From Saudi Town and Take 167 Prisoners*, L.A. Times, Feb. 1, 1991, at 1. Quote of Iranian Foreign Ministry Spokesperson, Morteza Sarmadi, Teheran Radio. Iran announced that "Iran will continue to intern planes and ships of all warring parties that enter its air space or its territorial waters." *Id.*

183. Telephone interview with Commander Michael Hinkley JAGC, USN, assigned as the Force Judge Advocate to Commander Middle East Force on board the flagship *USS La Salle* in the Persian Gulf from September, 1989, to August, 1991 (Nov. 26, 1991).

184. Departure Remarks by U.S. President George Bush and President Hassan Gouled of Djibouti, the White House, Washington, D.C., White House Briefing, Federal News Service (Apr. 24, 1991).

185. U.N. Doc. S/RES/665 (1990).

the organization."¹⁸⁶ The question of the use of the territorial seas of littoral states in the Persian Gulf by the MIF pinpoints a juncture where rights given under the laws of neutrality theoretically would disappear in circumstances in which the Security Council has undertaken measures involving use of force under Chapter VII of the U.N. Charter.

D. Straits

Naval practice of the United States conformed with the regime of Straits under the 1982 Law of the Sea and the traditional laws of war in that no interception efforts were made within the Straits of Hormuz or the Straits of Tiran.¹⁸⁷ While no interception activities took place within either of the Straits, reports imply MIF monitoring or surveillance of vessels transiting the straits.¹⁸⁸ The Strait of Hormuz lies within the territorial waters of Iran and Oman.¹⁸⁹ However, this does not change the legal status of the Strait of Hormuz as an international strait.¹⁹⁰ As a strait "used for international navigation between one part of the high seas or an exclusive economic zone or another part of the seas or an exclusive economic zone," the right of transit passage exists through the Strait.¹⁹¹ All ships and aircraft enjoy the rights of transit passage or the "continuous and expeditious transit of the Straits," meaning that vessels must proceed without delay, refrain from any threat or use of force against the sovereignty, territorial integrity, or political independ-

186. Restatement (Third) of Foreign Relations Law of the United States § 102 n.3 (1987). "The United States has recognized the binding character of such resolutions, for example, the resolution imposing an embargo on products of Southern Rhodesia." *Id.* See 22 U.S.C. § 287(c) (1988).

187. Interview with Commander Michael Hinkley JAGC, USN, *supra* note 183.

188. For instance, two Iraqi vessels which loaded at an off-shore oil platform belonging to Iraq in the northern Persian Gulf were tracked, with the first being intercepted in the Persian Gulf and the second in the Gulf of Oman. Eric Schmitt, *Yemen Agrees to Block Iraqi Oil; Missiles Flow to Kuwait Reported*, N.Y. Times, Aug. 22, 1990, at 12. "American warships continued to shadow two loaded Iraqi oil tankers in waters near the Persian Gulf today as the ships heading toward the Indian Ocean, showed no signs of reverting, course, Pentagon official said." Eric Schmitt, *Two Iraqi Tankers Ignore Pursuers*, N.Y. Times, Aug. 21, 1990, at 14.

189. Sayed Hassen Amin, *Political and Strategic Issues in the Persian-Arabian Gulf* 94 (1984).

190. *Id.*

191. The 1982 U.N. Convention on the Law of the Sea, art. 37.

This regime applies to the entire length and breadth of international straits less than 24 NM in breadth overlapped by territorial seas not governed by a special Montreux-type convention, and not qualifying as an island-mainland or "dead-end" strait.

The great majority of strategically important straits, e.g., Gibraltar Bab el Mandeb, Hormuz, and Malacca fall into this category.

Annotated Supplement to the Commanders Handbook, *supra* note 21, at 2.3.3.1 n.37.

ence of states bordering the strait, and "refrain from any activities other than those incident to their normal modes of continuous and expeditious transit" ¹⁹² Transit passage may not be suspended. ¹⁹³ The Straits of Tiran are classified as a "dead-end" strait connecting a part of the high seas or an exclusive economic zone and the territorial sea of a foreign zone. ¹⁹⁴ Innocent passage which may not be suspended applies in the Straits of Tiran. ¹⁹⁵

E. *Persian Gulf Interception as a Method to Enforce Sanctions*

Two independent influences bearing on the Persian Gulf interception demanded minimal interference with shipping and the least destructive means of enforcement of sanctions. First, as unobtrusive, limited, and minimal a use of force as possible was required in order to maintain the fragile coalition of nations supporting the embargo and the interception. Second, the "new world order" demands the highest adherence to law and order even in self-defense measures. Although the "new world order" remains undefined, when discussed, descriptions frequently involve the terms "legitimate," "sharing of power," "sharing of responsibility," "justice," and "fairness." While still "emerging," it is a concept with meaning, specifically "a world where the rule of law supplants the rule of the jungle, a world in which nations recognize the shared responsibility for freedom and justice, a world where the strong respect the right of the weak." ¹⁹⁶

192. 1982 U.N. Convention on the Law of the Sea, arts. 38 and 39.

193. *Id.* at Art. 44.

194. *Id.* at Art. 45. The so-called "dead-end" straits include the Straits of Tiran, Head Harbor Passage, Bahrain-Saudi Arabia Passage, the Strait of Georgia, and the Gulf of Honduras. Annotated Supplement to the Commanders Handbook, *supra* note 21.

195. "Neutral nations cannot suspend, hamper or otherwise impede this right of transit through international straits Belligerent forces may not use neutral straits as a place of sanctuary nor a base of operations, and belligerent warships may not exercise belligerent rights of visit and search in those waters." Commander's Handbook, *supra* note 22, at 7.3.5.

The principle that belligerents cannot use international straits waters for belligerent purposes is supported by a majority of writers according to Ronzitti. This is substantiated by state practice during the Persian Gulf Tanker War during which Oman, in 1980, made an official protest to Iran that Oman territorial waters were being violated by the attempts of Iranian warships "to identify passing ships." Further, Ronzitti finds that states' practices support the obligation of the littoral state to allow passage of neutral and belligerent vessels from hostilities. Ronzitti, *The Cirsis in the Law of Naval Warfare*, *supra* note 45, at 16-18. Ronzitti notes three exceptions: first, during World War I Denmark mined the Sound, the Great Belt, and the Little Belt; second, Italy closed the Strait of Messina in 1914; and third, Oman patrolled the territorial water in the Straits of Hormuz during the Gulf War. *Id.* at 17.

196. Robert M. Kimmitt, Under Secretary for Political Affairs, *Economics and National Security*, Address Before the American Bar Association, Section on International Law and Practice, Washington, D.C. (Apr. 25, 1991) in 2 Dept. of State Dispatch June 3, 1991, at 398.

Protection of human life and preservation of property is accorded highest value in this new regime of law and order. Thus, the interception as an enforcement device had to be above reproach. Accordingly, not only the means of enforcement, but the objectives were limited. The objectives were not those of war, but of enforcing the rule of law. As such, the objectives were specific and clearly articulated in Security Council resolutions. Speaking to the nature of the enforcement action endorsed by the Security Council, Secretary-General Perez de Cuellar stated:

The U.N. needed to demonstrate that: The way of enforcement was qualitatively different from the way of war; as such action issued from a collective engagement, it required a discipline all its own; it strove to minimize undeserved suffering to the extent humanly possible and to search for solutions for the special economic problem confronted by states arising from the carrying out of enforcement measures; what it demanded from the party against [from] which it was employed was not surrender but the righting of the wrong that had been committed; and it did not foreclose diplomatic efforts to arrive at a peaceful solution consistent with charter principles and the determinations made by the counsel.¹⁹⁷

The interception provides a controlled, limited, and highly precise enforcement tool which is reasonable and acceptable to the world community.¹⁹⁸ Regardless of the discretion given to intercepting nations under Resolution 665 as to the area, time, and use of force, the interception was in form designed to apply the least possible use of force in the least offensive and most controlled manner possible. Commander Clark has noted a trend beginning with the Cuban quarantine in interdiction techniques "to minimize excessive or unreasonable areas of confrontation and to avoid the excessive and unwarranted destruction of human resources and associated values."¹⁹⁹ The conditions which prevailed during the Persian Gulf crisis have strengthened this trend in the interception as an enforcement tool.

197. "A momentous significance well beyond the crisis . . ." U.N. Chron. 22 (Dec. 1990).

198. See Clark, *supra* note 94, at 169 for a discussion of these values in the Vietnam interdiction. "[T]hrough the prudent and limited utilization of automatic mines, the United States established a highly effective maritime interdiction campaign while it simultaneously avoided any unnecessary confrontation between superpowers and minimized the possibility of the unnecessary destruction of a wide range of human values." *Id.* at 168.

199. *Id.* at 171.

F. Sanctioning Device

The interception was initially instituted as a measure short of war and, as developed in the Persian Gulf setting, is a tool of economic coercion with specific articulated objectives.²⁰⁰ In notifying the Security Council of the U.S. interception operation on August 16, 1990, the United States indicated the interception was instituted specifically "to insure that the trade sanctions designed to secure the compliance of Iraq with Resolution 660 and to restore the legitimate government of Kuwait, are effective."²⁰¹ As Lauterpacht indicates, the right of visit and search as a traditional belligerent right generally has been instituted in support of another belligerent right or exercise such as blockade or seizure of contraband.

The United States instituted the interception making clear its objectives were those of Resolutions 660, 661, and 662, i.e., that Iraq withdraw immediately and unconditionally from Kuwait and that the legitimate government of Kuwait be restored. Secondly, the United States was motivated to weaken Iraq's ability to wage war. Resolution 665 makes clear that the interception operation had as its sole objective "to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661"²⁰² The objectives were clarified, publicized to the target state and its citizenry, and presented as the *quid pro quo* for termination of the interception.²⁰³ The objectives designated were short, quickly attainable, and within the power of Iraq, the target state.²⁰⁴ There was a clear relationship between the sanction and the remedy, with the onus clearly upon the target state.²⁰⁵ The burden and the blame for the deprivation under the interception operation was shifted to Iraq for it was made clear to Iraq that upon the withdrawal of forces and the restoration of the legitimate government of Kuwait, the interception operation would be discontinued. This strategy made the exercise more palatable to the world at large and was beneficial for publicity

200. Economic coercion is applied to bring about the change of policy or activity of a state. C. Lloyd Brown-John, *Multilateral Sanctions in International Law: A Comparative Analysis* 2-4 (1975).

201. Letter from the Charge d'affaires, *supra* note 125.

202. In the preamble to Resolution 665 (1990) it is stated that the Security Council institutes the blockade "[r]ecalling its Resolutions 660 (1990), 661 (1990), 662 (1990) and 664 (1990) and demanding their full and immediate implementation" (emphasis in original).

203. Brown-John, *supra* note 200, at 16.

204. *Id.* at 1, 16; see M. Nincic & Peter Wallenstein, *Dilemmas of Economic Coercion* (1983).

205. Brown-John, *supra* note 200, at 1-5; Nincic & Wallenstein, *supra* note 204, at 15.

or propaganda purposes.²⁰⁶ Further, while the goals were multiple, they were of a limited number and remained focused on an immediate primary purpose, the liberation of Kuwait.²⁰⁷

As Professor John Norton Moore notes regarding the mining of North Vietnam's harbors, "by speaking only of 'interdiction,' President Nixon avoided inadvertently signaling a wider objective, such as the economic or political subjugation of North Vietnam, which might have been implied by the use of the term 'blockade.'"²⁰⁸ The specific, limited nature of the interdiction does not encourage escalation. Rather, the practice of spelling out simple demands allows for the rapid de-escalation of the dispute. The remedy as presented to the world is easy, simple, direct, and within control of the target state. The interdiction is static and responsibility for any change in the status quo belongs with the target state.²⁰⁹ From the target state's perspective, it is much easier to respond to the concrete direct demand as a *quid pro quo* than to an act that may be an act of reprisal or a first step in the escalation of a dispute involving numerous interrelated issues. The alternative to change of policy, the deprivation resulting from the institution of an interception operation, is presented to the leadership as well as the civilian population of the target state and allows the sanctioning state to make its case to the citizenry of the target state.²¹⁰ Bush consistently made an appeal to the Iraqi citizens, saying, "We have no quarrel with the people of Iraq."²¹¹

In the settings involving the Cuban quarantine and the Vietnam interdiction, as in the Persian Gulf, the objectives were clarified, publicized to the target state and its citizenry, and presented as the *quid pro quo* for the maritime operation. Kennedy required the removal of the missiles in Cuba, and Nixon required the release of the POWs and a cease fire under international controls.²¹² Again, the objectives designated were precise and within the power of the target state. The direct

206. Brown-John, *supra* note 200, at 1-10; Nincic & Wallenstein, *supra* note 204, at 15; M.S. Daoudi & M.S. Dajani, *Economic Sanctions* (1983).

207. Brown-John, *supra* note 200, at 1-10; Nincic & Wallenstein, *supra* note 204, at 15; Daoudi & Dajani, *supra* note 206.

208. Clark, *supra* note 94 (quoting Moore, a "professor on the law of blockade," *The Wash. Post*, May 21, 1972, at 21). See Moore, *The Indo-China War*, *supra* note 91, at 39.

209. Brown-John, *supra* note 200, at 3; Daoudi & Dajani, *supra* note 206. Nincic & Wallenstein, *supra* note 204.

210. Brown-John, *supra* note 200, at 16; Nincic & Wallenstein, *supra* note 204, at 1; Daoudi & Dajani, *supra* note 206, at 26-27.

211. Address to the People of Iraq on the Persian Gulf Crisis, 26 Weekly Comp. Pres. Doc. 1389 (Sept. 16, 1990).

212. Clark, *supra* note 94, at 167.

relationship between the sanction and the remedy which would remove the sanction was clear. In the Persian Gulf interception, the Cuban missile crisis, and the mining of Vietnam harbors, objectives announced did not include toppling the government. As much as the Bush administration likely desired the toppling of the Hussein regime and hoped the interdiction might aid in achieving this purpose, this broader, more difficult objective was never articulated officially. Simple, limited objectives may propel the citizenry of the target state to push its leadership for these limited measures or change in policy, even if toppling the government or disposing of a dictatorship is beyond its capabilities. In short, as compared with blockade, the more recent quarantine, interdiction, and interception maritime zones are increasingly fine tuned in purpose.²¹³

G. *Product of Compromise and Coalition-Building*

The interception operation was a product of compromise and coalition-building. The restraint and control built into the interception procedures was required to maintain an already fragile coalition. The operation must be "accepted" and considered legitimate by the world community.²¹⁴ It must also be perceived by nations as necessary, reasonable, and lawful in all aspects.²¹⁵ The result was a carefully crafted interception procedure which allowed a more flexible, precise measure of interception.

The introduction of the concept of the "new world order" demanded that the interception procedures conform to the ideals being espoused. As a tool of law and order, the interception must observe in the strictest manner the necessity and proportionality requisites of the use of force. The increased emphasis on humanitarian concerns in values of life and property shaped an interception process which, while effective, was designed to avoid destructive use of force.²¹⁶ The terms used to define the new world order, "legitimate," "sharing of responsibility," "justice," and "fairness," had to describe the procedures and objectives of

213. *Id.* at 168.

214. "The 'legitimacy' of an act is a product of persuasion—since the collection of values and institutions we describe as law are in a process constantly of reconstruction." Alford, *supra* note 86, at 292.

215. "The reasonableness of the expectation of necessity by United States decision-makers will lend force to the persuasive element of law in the situation . . . [W]ill other decisionmakers conclude he has given the *proper* emphasis to the *proper* facts? . . . An initial decision concerning the necessity of the action by officials of a threatened state may be made; but this decision is subject to reappraisal in a general community perspective by other decision-makers." *Id.*

216. See Clark, *supra* note 94, for a discussion of this factor in the Vietnam interdiction.

the interception.²¹⁷ To satisfy these demands, the interception operation had to be beyond reproach.

H. Structures for Monitoring, Reporting and Advising Allies

Even though Resolution 665 allowed states to determine unilaterally "such measures commensurate to the specific circumstances as may be necessary" and did not require that intercepting forces be a United Nations force or under U.N. command, the Security Council attempted to retain a measure of control over the interception operation by "requesting" that states "co-ordinate their actions . . . using as appropriate mechanisms of the Military Staff Committee and after consultation with the Secretary-General to submit reports to the Security Council and its Committee . . . to facilitate the monitoring of the implementation of this resolution"²¹⁸ This attempt to control through consultation and oversight was a compromise between those states such as the Soviet Union which desired full U.N. control by use of a U.N. force or a force under U.N. command and states such as the United States and Great Britain which preferred forces deployed unilaterally under national command. The "request" that states use the Military Staff Committee "as appropriate" explicitly signaled a role for the Military Staff Committee as desired by the Soviet Union; yet, the language was broad enough to allow discretion to the United States and Great Britain to use force without resorting to the Military Staff Committee if they preferred.²¹⁹ Even though the military staff committee never became active, the contemplated use of these structures permitted compromises to be made and maintained the fragile coalition by allowing the Security Council a continuing role of monitoring, reviewing, and advising regarding use of force.

The continuing involvement of the Security Council through the Sanctions Committee and the Military Staff Committee is yet another example of the moderate and controlled nature of the interception. The use of the Sanctions Committee for oversight gives rise to a perception by the world community that the operation is reasonable, controlled, and limited. An established review process involving the formal structures

217. Kimmitt, *supra* note 196.

218. U.N. Doc. S/RES/665 (1990).

219. States took different positions regarding the role of the Military Staff committee. For instance, France took the position that each act of "coercion" would require resort to the Security Council and presumably the Military Staff Committee. *Naval Blockade Endorsed*, U.N. Chron. 17 (Dec. 1990). Prior to the adoption of Resolution 655, China had objected to the Military Staff Committee meeting to consider or advise regarding the interception activity in the Persian Gulf since the interception forces were not U.N. forces or under U.N. command, thereby forcing the Military Staff Committee to meet informally only. George Riding, *France; Paris Stressing Independent Role*, N.Y. Times, Aug. 18, 1990, at 6.

of the Security Council, the Sanctions Committee, and, at least on paper, the Military Staff Committee stresses that the operation not only has received the legitimizing approval of the Security Council, but that its day to day operation is in accordance with "right process" as well.²²⁰ Oversight by the Sanctions Committee and, in theory, the Military Staff Committee "legitimizes" the operation as a product of accepted organs of authority, rules, and procedures. This validation of the operation is significant for its acceptance by the international community.

The mandate of the Sanctions Committee regarding the sanctions is broad. Resolution 661, paragraph 6 establishes the Sanctions Committee as consisting of all members of the Security Council and directs the Sanctions Committee first, "to examine the reports on the progress of the implementation of the present resolution which will be submitted by the Secretary-General"; second, "to seek from all States further information regarding the action taken by them concerning the effective implementations laid down and the present resolution"; and third, then to report the Committee's observations and recommendations to the Security Council.²²¹ Resolution 661 "calls upon" the states to cooperate and supply information sought to the Sanctions Committee and "requests" the Secretary-General "to provide all necessary assistance to the Committee."²²² Resolution 666 imposes the responsibility on the Committee to review reports received from the Secretary-General, under the guidelines set forth in the resolution, in order to determine whether "humanitarian circumstances" have arisen, and to "report" to the Security Council "its decision as to how such needs should be met."²²³ Resolution 669 gives the Sanctions Committee the "task of examining requests for assistance" which have been submitted under Article 50 of the U.N. Charter by those states injured by the embargo and "making recommendations to the President of the Security Council for appropriate action."²²⁴

The Security Council has been involved significantly with the humanitarian aspects of the interception operation. The monitoring duties and the readiness of the United Nations to provide foodstuffs if an "urgent humanitarian need" arises facilitated the acceptance of an embargo of foodstuffs.²²⁵ The consensus on the embargo of foodstuffs might not have been forthcoming if the Committee of the Security Council had not been able to address major concerns particularly in

220. See Thomas M. Franck, *Legitimacy in the International System*, 82 *Amer. J. Int'l L.* 705 (1988).

221. U.N. Doc. S/RES/661 (1990).

222. *Id.*

223. U.N. Doc. S/RES/666 (1990).

224. U.N. Doc. S/RES/669 (1990).

225. *Id.*

making certain that humanitarian needs were addressed, that children under the age of fifteen, infants, and expectant and nursing mothers were not deprived, and that there be no delay in humanitarian aid reaching those in genuine need.²²⁶

The world community would not accept deprivation without the humanitarian aid exception and the constant monitoring. These safety valves alleviated the moral pressure that a civilian population not be made to suffer starvation or lack of medical necessities. The embargo would not have been sustained without these safeguards. The use of the Sanctions Committee to oversee and address humanitarian concerns established a precedent which will be hard to discard. It is doubtful that a future comprehensive embargo of goods and foodstuffs in an international environment characterized by intense multilateral involvement and cooperation could ever be imposed without the handling of humanitarian concerns by formal structures in an organized and comprehensive manner.

Typically, decisions would be made by the Sanctions Committee within their discretion under the mandate given them by the various Security Council resolutions with these decisions subsequently "approved" by the Security Council.²²⁷ Further, in instances where the Sanctions Committee could not resolve issues, the Committee would turn the matter over to the Security Council for resolution. This was the case regarding the setting of guidelines of Resolution 666 and the decision of August 15, 1991, to allow Iraq to sell up to 1.6 billion U.S. dollars worth of oil for a period of six months in order to buy food and medicine.²²⁸

226. At the same time, concerns that the Sanctions remain firm were alleviated by the obligation to donate and distribute food stuffs and other supplies for humanitarian aid through the U.N. and international humanitarian agencies. See *supra* note 137.

227. For instance, in making its decision on March 22, 1991 to permit delivery of food and "humanitarian supplies," the Sanctions Committee notified the Security Council of its decision for approval. John M. Goshko, *U.N. to Let Iraq Receive Food; Sanctions Eased After Report Described Dire Conditions*, Wash. Post, Mar. 23, 1991, at A15.

228. *Iraq Accuses France of Hypocrisy in Proposed U.N. Resolution on Oil Sales*, British Broadcast Corp., Summary of World Broadcasts, Aug. 14, 1991, at NE1150A1.

The activities of the Sanctions Committee illustrates that this is truly a "working body of the Security Council." For instance, on November 8, 1990, it was reported that Marjatta Rasi, as chairperson of the Sanctions Committee, described "tons and tons of medicines imported by Iraq with possible significance for chemical and biological warfare production. On March 22, 1991, the Sanctions Committee decided, in response to a report generated from a U.N. team headed by Under Secretary General Martti Ahtisaari which examined conditions in Iraq during March 10 to 17, 1991, and which warned of possible "epidemic and famine," to allow unlimited food imports and an easing of restraints on other humanitarian aid. On May 4, 1991, the Sanctions Committee determined that individual governments could unfreeze Iraq's assets to allow Iraq to buy food as long as the Sanctions

I. Protection of Non-Target States

Article 50 of the U.N. Charter permitted another moderating element of the embargo and interception in that the effect of the embargo and interception could be precisely and incisively directed toward Iraq and made less disruptive of the commerce and the economies of the nations which traded with Iraq.²²⁹ This gives a "right" to any state, other than the target state, which encounters "special economic problems" for measures taken by the Security Council directed against the target state, to "consult with the Security Council" in finding a "solution."²³⁰ This provision is a recognition that, because of "geographic reasons" or "special economic and financial relations with the victim state" or the states being sanctioned, measures may affect certain countries more than others.²³¹

By January 31, 1991, the Sanctions Committee had presented a recommendation to the President of the Security Council for an "appeal to all states on an urgent basis to provide immediate technical and financial assistance" and an invitation to "international organizations and development institutions to review and upgrade their assistance programs with" twenty nations.²³² "Moral suasion" rather than specific

Committee is notified and no member objects. On July 22, 1991, after considering the report of Prince Sabruddin Aga Khan, who heads the U.N. humanitarian program in Iraq, the Sanctions Committee, unable to agree on a formula for the sale of Iraqi oil to finance food purchases, turned the matter over to the Security Council. The Security Council subsequently approved the sale of up to 1.6 billion U.S. dollars' worth of oil during a period of six months to purchase food and medicine with oil sales approved by the Sanctions Committee and oil revenue paid directly into an escrow account for the U.N. Secretary-General to finance such purchases. *UN to Vote On Oil Sales For Iraq*, The Xinhua Gen. Overseas News Serv., Aug. 14, 1991, Item No. 0814021.

229. See Clark, *supra* note 94, at 165 for a discussion of the effect of the Vietnam interdiction on neutral commerce.

230. U.N. Charter article 50. This has been called "a corollary to the obligation of mutual assistance under Article 49" which states, "[T]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." Goodrich et al., *supra* note 29, at 338, 341.

U.N. Charter article 50 states: "[I]f preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems." *Id.* at 340.

231. Goodrich et al., *supra* note 29, at 341. In drafting this article, the Collective Measures Committee sought a need for consultation with the Security Council and the need for an ability to coordinate aid which might take the form of "direct assistance in cash or kind, provisions of alternative sources of supply and alternative markets, specific commodity purchase agreement [and] compensatory adjustments of international tariffs." *Id.*

232. *U.N. Official Says Countries Suffering Indirectly From Sanctions Need Assistance*,

amounts of money were requested on behalf of twenty nations.²³³ By March 22, 1991, twenty-one nations had appealed to the Secretary-General requesting assistance with economic financial and commercial losses estimated to aggregate thirty billion dollars.²³⁴ The Security Council made a "solemn appeal" for aid to those nations injured by the sanctions.²³⁵

No definition or guideline is given in the U.N. Charter regarding the meaning of "special economic problems."²³⁶ In submitting requests to the Security Council for consultations under Article 50, many states listed not only direct economic loss, but indirect economic loss as well. Direct economic losses claimed included freezing of outstanding claims against Iraq under the sanctions, the freezing or possible loss of other claims which would become payable subsequently, suspension of contracts in effect (loss of imports and exports), and unspecified direct loss particularly from contracts nearing completion.²³⁷ Indirect economic losses

BNA Int'l Trade Daily, Jan. 31, 1991, at 4 [hereinafter *Countries Suffering Indirectly*] (quoting Carl-August Fleishchhauer, Under Secretary-General for Legal Affairs and Legal Counsel to the United Nations).

233. Ron Howell, *U.N. Committee: Help Jordan Survive*, *Newsday*, Sept. 18, 1990, at 15 (citing Rasi, Chairwoman of the Sanctions Committee). "It sort of legitimizes that Jordan is indeed suffering." (Quote of an unnamed U.S. official.) *Id.*

234. *UN Appeals for Help to Countries Affected by Gulf Crisis*, *The Xinhua Gen. Overseas News Serv.*, Apr. 29, 1991, Item No. 0429009. The countries include Bangladesh, Bulgaria, Czechoslovakia, Djibouti, India, Jordan, Lebanon, Mauritania, Pakistan, the Philippines, Poland, Romania, Seychelles, Sri Lanka, the Sudan, Syria, Tunisia, Uruguay, Vietnam, Yemen, and Yugoslavia. *Id.*

235. Council President Paul Noterdaeme of Belgium made the appeal stating, "[T]he members of the council make a solemn appeal to states, financial institutions and UN bodies to respond positively and speedily to the recommendations to the Security Council committee . . . for assistance to countries which find themselves confronted with special economic problems arising from the carrying out of those measures imposed by Resolution 661 and which have invoked Article 50." *United Nations: Plea on Behalf of States Hit by Iraq Sanctions*, *Inter Press Serv.*, Apr. 29, 1991.

236. August Fleishchhauer, Under Secretary-General for Legal Affairs and Legal Counsel to the United Nations, distinguishes between general consequences, i.e. increases in oil prices, lost business opportunities, and loss of aid, and those economic problems directly resulting from the sanctions and the disruption of "economic, financial, and air links with Iraq and occupied Kuwait." *Countries Suffering Indirectly*, *supra* note 232, at 4.

237. See Letter Dated October 2, 1990, From The Prominent Representative of Czechoslovakia To The United Nations Addressed To The President Of The Security Council, U.N. Doc. S/21837 (1990). Sri Lanka included worker remittances from abroad. Letter Dated September 5, 1990, From a Permanent Representative of Sri Lanka to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/21710 (1990). Mauritania included the disruption of joint ventures with Iraq and Kuwait and the discontinuance of investment and export programs for these joint ventures. Annex to Letter Dated September 24, 1990, From the Permanent Representative of Mauritania to the United Nations Addressed to the Secretary-General, U.N. Doc. S/21818 (1990).

included loss from an increase of oil prices, impact on balance of payments, impact on inflation and economic growth, socio-economic conditions, the devaluation of currency, inflation, and disruption of foreign aid.²³⁸ The response included unilateral contributions from states and regional organizations. Unilateral contributions of funds were made by Austria, Japan, Ireland, Norway, the Soviet Union, Switzerland, the United States, and the European Economic Community.²³⁹ On September 7, the European Economic Community promised two billion dollars held in aid on an emergency basis to Jordan, Egypt, and Turkey.²⁴⁰ Further, Saudi Arabia and Venezuela announced a significant increase in production of oil to make up for oil embargoed under the sanctions.²⁴¹

J. Heightened Effectiveness

The interception was successful in that virtually all commercial maritime traffic to Iraq and occupied Kuwait ceased. While the declared objective to force a change in the policy of the state was not met, the interception did keep pressure on Hussein and diminished Iraq's capacity to wage war.²⁴² Enforcement was restrained and effectiveness heightened while the potential for destructiveness or injury was diminished.²⁴³

K. Discriminating and Selective

The concept of visit and search and the enforcement methods used allowed a discriminating interdiction of cargo destined for or leaving

238. See Letter Dated September 5, 1990, From The Permanent Representative of Sri Lanka to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/21710 (1990); Letter Dated September 10, 1990, from the Permanent Representative of Lebanon to the United Nations Addressed to the Secretary-General, U.N. Doc. S/21737 (1990); Annex to Letter Dated September 24, 1990, from the Minister for Foreign Affairs and Cooperation of Mauritania Addressed to the Secretary-General, U.N. Doc. S/21818 (1990).

239. *UN Appeals for Help to Countries Affected by Gulf Crisis*, *supra* note 234.

240. Michael Binyon, *E.C. Promises Assistance for Hardest Hit Arab States*, *The Times* (London), Sept. 8, 1990, at 8. On the same date, Britain announced it would give a financial aid package to Syria in light of Syria's contributions and cooperation with the Allies. *Id.*

241. Janet Cawley & Christopher Drew, *Bush Asserts Troop Mission is "Defensive"*, *The Chicago Tribune*, Aug. 9, 1990, at 1.

242. "The very quiet, very professional way [the Navy] put that embargo on—which continues to this day, out of sight, but very, very effective—may be one of the most important things we did." *Severing Saddam's Lifeline*, *supra* note 1, at 13 (quoting Gen. Merrill McPeak, U.S. Air Force Chief of Staff).

243. This is a trend emphasized by Clark regarding the Vietnam mining operation. "[T]he United States established a highly effective maritime interdiction campaign while it simultaneously avoided any unnecessary confrontation between super powers and minimized the possibility of the unnecessary destruction of a wide range of human values." Clark, *supra* note 94, at 160, 168.

Iraq without preventing all maritime traffic to and from Iraq. The ability to direct interception efforts towards specific cargo allows enforcement of a comprehensive embargo and conformance to humanitarian requisites in that medicines may pass freely as required. Likewise, if authorized and controlled by the Sanctions Committee, foodstuffs may also pass under humanitarian circumstances.

There was no blockade of or interference with legitimate shipping to neutral ports. The highly selective and incisive nature of the inquiry enabled legitimate commerce to proceed freely, leaving undisturbed trade between all nations except the target state. The area of enforcement was limited and, compared to the Navicert system used in World War II, a small percentage of shipping was affected with only 211 vessels diverted out of 12,648 vessels challenged as of January, 1992.²⁴⁴

L. Highly Controlled

Each encounter was a circumstance-specific exercise. The boarding "teams gauged carefully the amount of resistance to be encountered, force requirements and necessary measures to ensure the safety of boarding personnel."²⁴⁵ Flexibility was built into the process. An array of options consisting of different teams and different levels of force allowed different responses. A variety of teams with specialized skills were used as needed. Four-man teams of Coast Guard LeDets experienced in visit and search of drug smuggling vessels and familiar with shipping laws, documents, procedures, and the search process executed the majority of the boardings.²⁴⁶ Marine Special Operations Teams of ten Marines each, experienced in "small-unit tactics, helicopter insertion, and rapid response to contingency situations," together with Navy SEALs, boarded vessels judged dangerous.²⁴⁷

A series of tactics available to the on-scene commander escalating toward use of force when the challenged vessel refused to cooperate included: giving time limits for compliance, forcing the vessel to slow by moving MIF vessels across the bow of the challenged vessel, firing warning shots in sequence across the bow of the challenged vessel, low-level passes by S-14 and S/A-18 aircraft, and additionally, insertion of

244. U.S. Central Command, MacDill Air Force Base, Florida, Multinational Maritime Intercept Summary, Jan. 10, 1992 (on file with author). See also Clark, *supra* note 94, at 71, 73, and 84 for a discussion of the Vietnam interdiction as a limited, precise, and selective tool.

245. Delery, *supra* note 1, at 68.

246. *Id.*; *Severing Saddam's Lifeline*, *supra* note 1, at 12.

247. Delery, *supra* note 1, at 68; *Severing Saddam's Lifeline*, *supra* note 1, at 12. "Their ability to place a boarding team on a non-cooperative vessel via helicopter has been a significant factor in maritime interception operations." Delery, *supra* note 1, at 68.

Marines by helicopter and U.S. sailors and Coast Guard LeDets from small boats, with reinforcements possible.²⁴⁸ Attempts were always made to convince ship masters to comply by show of overwhelming force rather than by use of force.

As the type and amount of force was constantly within human control, de-escalation, like escalation, was always possible if confrontation was not desired. Use of force could be arrested at any level. Due to the allowance of time and decision-making, human control could be exercised on numerous levels.²⁴⁹ Reportedly, President Mitterand's permission was required before any French vessels could use "force."²⁵⁰ Similarly, Fogarty's authorization was required prior to "use of force" by U.S. vessels.

M. Notice and Options Given Intercepted Vessel

In addition to public announcements made by U.S. Secretary of State James Baker on August 12, 1990, and the U.S. Department of Defense Press Release of August 16, 1990, Special Warning No. 80 issued by the U.S. Department of the Navy on August 17, 1990, gave clear notice of the area and intention of immediate effectiveness and manner of interception.²⁵¹ With knowledge of the general area of interception, ship masters had time and opportunity to consider options and make a reasoned choice whether to enter the zone and be challenged. At all times the decision to enter the zone was voluntary and within the control of the ship master.²⁵² Special Warning No. 80 gave clear notice of which ships would be intercepted: "All merchant ships perceived to be proceeding to or from Iraqi or Kuwaiti ports, or transshipment points and carrying embargoed material to or from Iraq or Kuwait."

248. Delery, *supra* note 1, at 71.

249. Regarding the boarding of the *Zanoobia*, "[t]he Master was unwilling to divert, and the decision was passed down the U.S. chain of command to take control of the ships." *Severing Saddam's Lifeline*, *supra* note 1, at 11.

250. *Id.*

251. Statement of U.S. Secretary of State James Baker, Press Release of Aug. 12, 1990 [hereinafter Press Release of James Baker]; Desert Shield memorandum, *supra* note 128; see Clark, *supra* note 94, at 168 for a discussion of the role of notification in minimizing destruction.

252. Clark, *supra* note 94, at 166.

This general built-in delaying feature of "blockade" or "maritime interdiction," which because of its relative slowness to operate gives each side time to think and therefore reduces the risks associated with such an operation, is of critical importance to the decision makers involved in reducing the likelihood that a hasty decision might be forthcoming.

Id. Laurence W. Martin finds "blockade thus has one of the most desirable characteristics in a technique of crisis management, that of transferring the onus of escalation to the other side." *Id.* (citing Laurence W. Martin, *The Sea in Modern Strategy* 160 (1968)).

Notice was given of the procedure which would be followed. If perceived as proceeding to a prohibited port with prohibited cargo and within the interception area, the vessels "will be intercepted and may be searched," and if verified "will not be allowed to proceed with their planned transit."²⁵³ Shipmasters were aware of the limited objectives and the limitation of action to be taken against them as well as the routine. Knowledge of the components of the operation encouraged effective, rational decision-making by ship masters in choosing options.²⁵⁴ Communication and interaction between the interceptors and the intercepted was ongoing. Persuasion was aided by verbal interaction as well as by the possibility of forceful tactics. Misconception could be clarified and tensions reduced.²⁵⁵

Any vessel destined for Aqaba, Kuwait, or Iraq was subject to being boarded and searched. Vessels intercepted and challenged were offered the option of diverting without being boarded.²⁵⁶ If boarding was opted for and prohibited goods found, the master again was offered the option of diverting to an alternative port.²⁵⁷ Confrontation was avoidable at each juncture. Clear "avenues of withdrawal" and compliance were offered to the intercepted vessel throughout the process.²⁵⁸

N. Multilateral Effort

The multilateral effort and cooperation generated solidarity and resolve in enforcing the sanctions. The pressure of world opinion was brought to bear on Hussein. Efforts of national forces under unilateral command with coordination up and down and between respective chains of command proved to be an "effective" deployment of force under

253. *Id.*; Press Release of James Baker, *supra* note 251.

254. "The most essential requirement for coordination in economic action is action of a familiar and accustomed pattern. This enhances the likelihood of a rational response of the opponent along predictable lines." Alford, *supra* note 86, at 292-93.

"In some cases, the blockading or interdicting nation must also make a decision such as whether to board or block passage of a vessel. It is the blockade-running nation, however, which must *first* make the key decision to bring about such a confrontation once the blockader's prestige is placed on the line." Clark, *supra* note 94, at 169 (citing Martin, *supra* note 252, at 160).

255. "The *Reasoner's* Commanding Officer, as the on-scene commander, issued warnings via bridge-to-bridge radio [A]fter repeated radio calls the master finally stated that it would take two to three hours to contact the ships owners in Iraq [T]he *Reasoner* advised the *Amuriyah* that she would have fifteen minutes to comply with the warnings, by slowing the ship." Delery, *supra* note 1, at 71.

256. *Id.* at 67.

257. *Id.*

258. "It is within the interests of the United States . . . to provide avenues of withdrawal when withdrawals are consistent with the United States policy." Alford, *supra* note 86, at 292.

Chapter VII of the U.N. Charter and established use of national forces under national command as a precedent under Chapter VII.²⁵⁹ The coalition efforts sustained support for the sanctions bringing pressure to bear on those nations which might otherwise not have complied. The concerted action by twenty nations and the U.N. endorsement and Sanctions Committee monitoring contributed to the perception that the interception was legitimate and reasonable.

V. CONCLUSION

The U.N. Resolution 665 endorsement of the interception illustrates the pliancy of the Charter framework.²⁶⁰ Provisions are susceptible of interpretations necessary to serve the need at hand. Nations can work together within the structure of the U.N. Charter and resolve differences through compromise.

Benefits of working within the U.N. Charter to resolve disputes and respond to aggression will prompt increased use of and a larger enforcement role for the United Nations and other international organizations. As the Security Council is strengthened, it will engage itself more frequently in disputes at an earlier stage, denominate an aggressor, and enact measures under Chapter VII.

The interception set a new standard in enforcement. Tactics achieved heightened efficiency and heightened protection of life and property. The pressures of cooperation and coalition-building will continue to encourage this development. The interception is a proven enforcement tool and has established a precedent under Chapter VII. Since the United Nations has practical experience with the interception, the Security Council should be less hesitant to resort to its use in the future.

A larger role for the interception is advocated, as the United Nations addresses disputes in new contexts such as preventing the transfer of nuclear arms to dictatorships or resolving endless regional wars. Effective use of sanctions by the United Nations to resolve international peace and security requires that the interception process be an accepted part of the Article 41 sanctioning process. In the Persian Gulf context, the interception as a method to enforce sanctions under Chapter VII is more closely associated with Article 41 sanctions than with Article 42

259. "The evidence is clear that the naval enforcement of U.N. Sanctions against Iraq was a major force in demonstrating to the world that the allies could form an effective military coalition." *Severing Saddam's Lifeline*, *supra* note 1, at 12-13.

"The high degree of coordination exhibited by the multi-national naval force in enforcing sanctions reflected years of peacetime training and cooperation between the United States and her allies." *Id.*

260. David Scheffer, Senior Associate, Carnegie Endowment for International Peace; Press Briefing on Multilateral Options in the Persian Gulf Crisis Sponsored By the United Nations Association of the U.S., Federal News Serv. (Oct. 9, 1990).

measures involving use of force. While the blockade is listed in Article 42, the interception, based on visit and search, is conceptually distinct from the blockade.²⁶¹ Although visit and search is considered a use of force under traditional laws of war, the procedures carefully geared to divert without actual use of force make a destructive use of force unlikely.²⁶² Used in conjunction with sanctions to force resolution of disputes, the interception functions as a device to prevent war. Parallels can be drawn with the United Nations peacekeeping forces, and interception should be approached in as flexible a manner.²⁶³ While use of interception to enforce U.N. sanctions provides a strong argument for a U.N. navy, a proposal made by the Soviets in 1987, the Persian Gulf experience teaches that naval operations commanded unilaterally with cooperation among commands can be highly effective. The Gulf War also teaches that enforcement under Chapter VII is not rigidly confined but affords the Security Council leeway to creatively, efficiently, and effectively restore international peace and security.

261. Regarding the Cuban quarantine, Captain McDevitt argues "that the Quarantine may be considered a measure for 'specific' settlement of the dispute and not the 'enforcement action'" described in Article 53(1) of the Charter. Alford, *supra* note 86, at 288.

262. From August, 1990, to January, 1992, out of the total of seventeen instances in which vessels refused to stop, warning fire was used in only eleven instances, while disabling fire was never used and no ships were disabled. U.S. Central Command, Diversion Summary (Jan. 1992) (on file with author).

263.

An emergency international UN Force can be developed on the basis of three different concepts:

(a) it can, in the *first* place, be set up on the basis of principles reflected in the Constitution of the United Nations itself. This would mean that its chief responsible officer should be appointed by the United Nations and that he, in his function, should be responsible ultimately to the General Assembly and/or the Security Council. . . .

(b) *second* possibility is that the United Nations charge a country, or a group of countries, with responsibility to provide independently for an emergency international Force serving for purposes determined by the United Nations. . . .

(c) Finally, as a *third* possibility, an emergency international force may be set up in agreement among a group of nations, later to be brought into an appropriate relationship to the United Nations.

Higgins, *supra* note 31.

See *The Middle East: Hearing Before Subcommittee on the Near Eastern and South Asian Affairs Subcommittee of the Senate Foreign Relations Comm.*, 102d Cong., 1st Sess. 13 (1991) for discussion of rapid deployment force.

