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Challenges to Maritime Interception Operations in the War on Terror: Bridging the Gap

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CHALLENGES TO MARITIME INTERCEPTION OPERATIONS IN THE WAR ON TERROR: BRIDGING THE GAP

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INTRODUCTION

Limited Maritime Interception Operations have been occurring for decades under United Nations auspices based on a traditional regime of flag-state consent.¹ Today, a new form of Maritime Interception Operations (“MIOs”) is emerging. These new MIOs are designed to prevent the unique and potentially catastrophic threats posed by terrorist travel and transport of weapons of mass destruction (“WMD”) in the war on terror, and may become a key tool in the war on terror and in securing the world in the future.² The United States Navy received a wake-up call on 9/11. According to one defense official, “[w]hen we woke up on the 12th of September, the first thing that we were directed to do by the director of naval intelligence was make sure what happened with an airplane doesn’t happen with a ship.”³

There are some who would argue that these new “Expanded” MIOs are pushing the envelope of what traditional international and maritime law would permit a nation-state to do with respect to a vessel flagged under another state. However, others view these new

1. See discussion *infra* Part II (providing a historical overview of United Nations Security Council Resolutions (“UNSCRs”) authorizing embargoes and blockades against various countries, including Rhodesia, Iraq, Haiti, and Yugoslavia).

2. See Vernon Loeb, *Fighting Terror on the High Seas; European Command’s Overshadowed—but Key—Role in War*, WASH. POST, June 11, 2002, at A15 (reporting the interception of Syrian-registered merchant vessel, Hajji Rahmeh, which was one of the first post-September 11 Maritime Interception Operations (“MIOs”) and part of an overall scheme designed to uncover terrorists on the high-seas); see also News Release, Headquarters United States Central Command, USS Decatur Captures Possible Al-Qaida Associated Drug-Smuggling Dhow in Arabian Gulf (Dec. 19, 2003), available at <http://usinfo.state.gov/ei/Archive/2003/Dec/31-872191.html> [hereinafter USS Decatur Captures Possible Al-Qaida] (describing one Expanded MIO that led to the capture of a 40-foot dhow in the Arabian Gulf that was smuggling narcotics linked to Al-Qaida).

3. Loeb, *supra* note 2, at A15.

operations as consistent with evolving trends in international and maritime law.⁴ For example, the master's authority over his ship (a key factor in any MIO analysis), once nearly absolute as the only apparent source of law in a self-contained world, has diminished in modern times;⁵ in part due to the increase in communications that allow ship owners and operators to make decisions in near real time.⁶ Over the past sixty years, developments in international law have likewise eroded the role of nation-states under whose flags these commercial vessels travel.⁷ Still, it is not clear to what extent this erosion impacts the time-tested principle of flag-state consent for searches of vessels flying its flag by other nations. As the world faces an increase in international terrorism, what is clear, however, is that seagoing vessels are more at risk than ever of unwittingly facilitating terrorist travel or the transfer of WMD.

4. See generally Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131 (2005) (critiquing President George W. Bush's proposed Proliferation Security Initiative ("PSI") and assessing that it is seen as a natural progression of international law in order to combat the threat of terrorism and weapons of mass destruction ("WMD") on the high seas). The author does acknowledge that some interdictions could violate international law, but the PSI seeks to amend legal authorities in order to avoid this potential violation. *Id.*

5. See, e.g., *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.D. Mass. 1823) (Story, J. on circuit) (noting that vessel masters at sea have "summary, and often absolute" authority); see also discussion *infra* Part I.A.2 (discussing the diminution of ship masters' authority). For a modern day view, although without implications of the authority to impose brutal punishment, see Karen C. Hildebrandt, *Chartering Cruise Ships for Special Occasions*, 29 J. MAR. L. & COM. 205, 211 (1998) (discussing a relatively recent trend in chartering ships for special occasions, the author noted that "the ship's master is the ultimate authority over everyone and everything . . . [I]t is critical that the master be able to veto any conduct or plan that may jeopardize the safety of the vessel.").

6. See, e.g., Francesco Berlingieri, *The Origin and Scope of the Maritime Lien for Supplies or Repairs in Polish Law: Loginter S.A. v. M/V Nobility*, 177 F. Supp. 2d 411, 2002 AMC 283 (D. Md. 2001), 33 J. MAR. L. & COM. 405, 406-07 (2002) (discussing the evolution of international conventions' treatment of maritime liens and the ultimate abolishment of maritime liens due to advances in communications technology). Maritime liens were used to obtain credit for ship services and supplies that shipmasters obtained in the absence of ship owners, but the need for such liens diminished when communication advances led to ship owners' ability to respond quicker to shipmasters requests for funds for such services and supplies. *Id.*

7. See discussion *infra* Part I.A (analyzing the ship master's discretion and authority to control the ship's safety, security, navigation, and commercial dealings independent of the flag state).

The primary purpose of this article is to analyze what authority exists under international law for the United States, or any other country, to conduct these new MIOs to combat the increased threat to peace and security posed by international terrorism.⁸ This article also presents proposals to augment existing legal authority as necessary to counter the terrorist threat consistent with international law and practice.⁹

To begin this analysis, it is important to look broadly at traditional law of the sea principles concerning the boarding of vessels under the flag of a foreign state. These principles include freedom of navigation, exceptions to flag-state jurisdiction, and the jurisprudential limitations upon a master's ability to consent to searches of his vessel and crewmembers or passengers on board the vessel.¹⁰ The article then chronicles historical precedents for the use of traditional MIOs under relevant U.N. Security Council Resolutions ("UNSCRs"), and explores whether, and to what extent, any of these models provide a legal basis to support an expansion of such operations to address the emerging needs in the war on terror. After examining modern MIOs carried out after 9/11, this article then analyzes recent developments in maritime and international law that may authorize ship boardings, focusing on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA") and its 2005 Protocol.¹¹ Next, this article analyzes U.N. authorities for MIOs,¹² and other similar regimes—

8. See discussion *infra* Parts V–VI (providing an overview of modern U.N. authorities and international law enforcement regimes under which MIOs operate).

9. See discussion *infra* Part VIII (recommending various proposals from seeking U.N. Security Council authority in the form of a Resolution to conduct MIOs to seeking an international convention that authorizes nonconsensual boarding of vessels).

10. See discussion *infra* Part I.A (deriving principles of navigation freedom and exceptions to flag-state jurisdiction largely from an analysis of the United Nations Convention on the Law of Sea).

11. See Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 3, 1988, 1678 U.N.T.S. 221 (entered in force Mar. 1, 1992) [hereinafter SUA]; Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF. 15/21 (Oct. 14, 2005) [hereinafter SUA 2005 Protocol].

12. See discussion *infra* Part V (discussing Article 51 of the U.N. Charter and several post-September 11 U.N. Security Council Resolutions related to combating terrorism).

including counter-narcotics,¹³ human smuggling¹⁴ and the Proliferation Security Initiative¹⁵—that may lend support to a discussion of expanding MIOs. Finally, this article concludes with a summary of legal authorities which support MIOs, and posits ways to expand such authorities consistent with international law and practice in order to enhance our efforts in the war on terror.

I. LAW OF THE SEA PRINCIPLES CONCERNING THE BOARDING OF VESSELS UNDER THE FLAG OF A FOREIGN STATE

As a general principle of law, a vessel in international waters is subject only to the jurisdiction of the state under which it is flagged.¹⁶ A corollary to this principle, that the flag state's consent is required for another state to exercise jurisdiction over a vessel found outside of that state's national waters, has limited exceptions.¹⁷ Most notable of these is whether the vessel's master has sufficient authority under international law to permit a MIO in the absence of flag-state consent.¹⁸ These exceptions are examined below.

13. See discussion *infra* Part VI.A (discussing counter-narcotics operations and urging expansion of such efforts to combat terrorism or terrorist related-activities such as the smuggling of WMD).

14. See discussion *infra* Part VI.B (discussing U.N. efforts to combat illicit human smuggling operations through authorized interdictions, while also suggesting that new and more effective international agreements can be reached).

15. See discussion *infra* Part VI.C (describing the PSI designed to combat WMD proliferation through cooperative intelligence gathering and interdictions of suspected WMD smuggling vessels).

16. By custom and convention, states may board a vessel without the consent of the flagged vessel within the territorial waters of that state to exercise criminal jurisdiction if the consequences of the crime extend to the coastal state, or to enforce fiscal and customs laws and regulations. See United Nations Convention on the Law of the Seas arts. 21(h), 27(a), Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397, 405, 407 [hereinafter UNCLOS].

17. See *id.* art. 27, 1833 U.N.T.S. at 407 (listing limited instances where a coastal state can exercise its criminal jurisdiction aboard foreign ships that are passing through its territorial sea).

18. See *id.* art. 27(c) (authorizing the ship's master or the flag state to independently consent to a coastal state's boarding and search of the ship).

A. FREEDOM OF NAVIGATION AND EXCEPTIONS TO EXCLUSIVE
FLAG STATE JURISDICTION, INCLUDING MASTER'S CONSENT TO
BOARDINGS

The United Nations Convention on the Law of Sea ("UNCLOS" or the "Convention"), which the United States regards as the best reflection of customary international law on navigational freedoms¹⁹ and coastal state jurisdiction, sets forth the principles governing flag-state jurisdiction on the high seas. In general, the state whose flag a ship is entitled to fly, and in which it is registered, has legal jurisdiction over that ship on the high seas.²⁰ Ships, including warships, which represent states other than the flag state are not justified in boarding a foreign merchant ship encountered in international waters²¹ absent an exception conferred by treaty or found in customary international law. For example, under customary international law, as reflected in UNCLOS Article 110, a warship²² has the right to approach any vessel in international waters to verify its nationality.²³ Additionally, a warship is authorized to stop and

19. *See id.* art. 87, 1833 U.N.T.S. at 432 (stating that "[t]he high seas are open to all States, whether coastal or land-locked"); *id.* art. 90, 1833 U.N.T.S. at 433 (providing that "[e]very State, whether coastal or land-locked, has the right to sail ships flying its flags on the high seas").

20. *See id.* arts. 27, 28, 91, 92, 94, 97, 217–18, 220, 226–27, 231, 1833 U.N.T.S. at 407–08, 433–35, 486–89, 491, 493 (providing general principles on flag-state jurisdiction); *see also* Steve Raaynakers, *Maritime Transportation and High Seas Governance—Regulation, Risks and the IMO Regime* 14 (Paper presented at the International Workshop on Governance of High Seas Biodiversity Conservation in Cairns, Australia, June 17–20, 2003), *available at* http://www.imo.org/includes/blastDataonly.asp/data_id%3D8594/RaaymakersHighSeasPaper.pdf (providing an overview of the concept of "flag State jurisdiction" and relating the obligations of the flag state to comply with relevant international laws, including maritime safety and environmental protection laws).

21. While the terms "high seas" and "international waters" are not precisely interchangeable, the issues analyzed in this paper are unaffected by issues related to the exclusive economic zone or the coastal zone. Accordingly, no distinction is intended for purposes of this discussion in the use of either term. *See* Raaynakers, *supra* note 20, at 2 (noting that "international waters" is a common term used to refer to the "high seas").

22. Article 110 also permits military aircraft or other authorized state ships or aircraft to carry out this inspection. *See* UNCLOS, *supra* note 16, art. 110(4)–(5), 1833 U.N.T.S. at 438–39. This discussion, however, will refer only to warships.

23. *See id.* art. 110(2), 1833 U.N.T.S. at 438 ("[T]he warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the

board a foreign flagged-vessel²⁴ without flag-state consent if there exists reasonable grounds to suspect that the ship is engaged in piracy, the slave trade, unauthorized broadcasting (and the flag state of the warship has jurisdiction), or if the vessel is without nationality.²⁵ If the vessel is engaged in slavery or piracy, the boarding party can take action against the vessel and its crew.²⁶

In addition, under the principle of belligerent right of visit and search, a warship can stop and search a foreign-flagged vessel when it is reasonably suspected of supplying weapons to a third party in an ongoing armed conflict.²⁷ Section V will discuss this concept more fully in connection with the inherent right to self-defense under Article 51 of the U.N. Charter.²⁸

documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.”).

24. These provisions do not apply where the foreign flag vessel is a warship or other government vessel. *See id.* art. 110(1), 1833 U.N.T.S. at 438; *id.* arts. 95–96, 1833 U.N.T.S. at 435 (providing that warships and ships used for governmental, non-commercial services “have complete immunity from the jurisdiction of any State other than the flag State”).

25. *See id.* art. 110(1), 1833 U.N.T.S. at 438. One well-publicized boarding pursuant to UNCLOS Article 110 occurred on December 10, 2002, when two Spanish warships stopped a vessel with no flag on the high seas approximately 600 miles off the coast of Yemen. *See* B. Raman, *Interception of Yemen-Bound Scud Missiles*, Dec. 12, 2002, available at <http://www.saag.org/papers6/paper563.html>. The Spanish warships were authorized to stop and board the ship to confirm nationality, pursuant to Article 110. *Id.* (describing the intercepted vessel to be a North Korean ship called So San carrying fifteen Scud missiles).

26. *See* UNCLOS, *supra* note 16, art. 105, 1833 U.N.T.S. at 437 (“On the high seas, or in any place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest persons and seize the property on board.”).

27. *See* DEP’T OF THE NAVY, NWP 1-14M: THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 7.6–§ 7.6.2 (1995) [hereinafter COMMANDER’S NAVAL HANDBOOK] (detailing the procedure for “U.S. warships exercising the belligerent right of visit and search” and stating that the purpose of the visit and search is to determine whether the vessel is neutral or an enemy).

28. *See* U.N. Charter art. 51 (upholding “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”); *see also* DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 921–37 (6th ed. 2004) (providing case law on the right to self-defense). The case of *Caroline*, which involved the American vessel *Caroline* that attacked British ships in Canadian waters and prompted the British to retaliate by sending the vessel over Niagra Falls, sets forth the “requirements of necessity and proportionality” in self-defense cases. *Id.* at 921–22.

The following sections will discuss the authority of a commercial vessel's master in the context of both international agreements that control various aspects of commercial shipping and maritime industry customs and practices. UNCLOS²⁹ and various IMO conventions,³⁰ which provide discussions of a master's authority over his ship in international agreements, impose standards reflecting the recognition of the professionalism of the ship's officers. Examples of commercial practices that highlight the master's authority over his vessel can be found in historical and modern maritime law decisions from courts throughout the world.³¹

1. *The Master's Authority in UNCLOS*

At least two articles of UNCLOS offer an insight into a master's authority to allow foreign officials on board his vessel in international waters. While the Convention does not directly address a master's authority to consent to a foreign warship's boarding, neither does the Convention purport to be a comprehensive statement on maritime practices.

Even so, in the context of a coastal state's rights over foreign flagged vessels in its territorial seas, Article 27 of the Convention certified that "[c]riminal jurisdiction on board a foreign ship" twice distinguishes the master's discretion in dealing with coastal state officials from the coastal state's obligation to seek the flag state's permission.³² An exception to the general rule in Article 27—against a coastal state's exercise of criminal jurisdiction or its investigation of a crime committed on board the foreign flagged ship during its passage through a coastal state's territorial seas—addresses the authority of the master to request coastal state assistance.³³ Article

29. See UNCLOS, *supra* note 16, art. 27(c), 1833 U.N.T.S. at 407 (affording a shipmaster the authority to request assistance from a coastal state in conducting criminal investigations aboard).

30. See discussion *infra* Part I.A.2 (discussing three IMO Conventions that recognize the shipmaster's authority to make immediate decisions on board).

31. See discussion *infra* Part I.A.3 (explaining the widespread acceptance of the shipmaster's authority to make binding decisions when dealing with commercial matters); see also *The Steamship Styria v. Morgan*, 186 U.S. 1 (1902); *The China*, 74 U.S. 53 (1868); *United States Coast Guard v. Merchant Mariner's Document No. Z217567381, Decision of Commandant, No. 2098* (Mar. 18, 1977).

32. UNCLOS, *supra* note 16, art. 27, 1833 U.N.T.S. at 407.

33. *Id.* art. 27(1)(c), 1833 U.N.T.S. at 407.

27(1)(c) would allow coastal state authorities to board a vessel “if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State.”³⁴ The exception in subparagraph (c) is an unequivocal recognition that both flag-state officials and the ship’s master may— independent of one another—invite coastal state officials aboard to assist with criminal matters.

A second instance in Article 27 where the master’s authority over his ship comes into play is the triggering of the requirement for the coastal state to inform flag-state officials of its exercise of jurisdiction over the investigation of a crime on board the vessel. Specifically, Article 27(3) of UNCLOS provides:

3. . . . the coastal State shall, *if the master so requests*, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship’s crew. In cases of emergency this notification may be communicated while the measures are being taken.³⁵

Under the terms of Article 27(3), the coastal state has no requirement to report to the flag state its intended actions on board unless “the master so requests.”³⁶ A master who believes that an investigation is warranted is indisputably authorized in his own right to request a foreign state to board his vessel. Consent granted by the master to board to conduct such an investigation is yet another potential ground permitting searches for terrorists at sea. While UNCLOS Article 27 focuses on criminal jurisdiction within a nation’s territorial seas, and not in international waters,³⁷ the Convention nonetheless recognizes that the master has a measure of control over his ship independent from, even if coexistent with, the flag state.³⁸

34. *Id.*

35. *Id.* art. 27(3), 1833 U.N.T.S. at 408 (emphasis added).

36. *Id.*

37. *See id.* art. 27, 86, 1833 U.N.T.S. at 407, 432 (distinguishing territorial seas and the high seas).

38. *See id.* art. 94(4)(b), 1833 U.N.T.S. at 434 (providing that a flag state must place each ship in the charge of its master and officers).

2. *The Master's Authority Under the International Maritime Organization Conventions (IMO)*

In the modern era, advances in communications have undermined the traditional autonomy of the ship's master in controlling his ship. Whereas ship owners were traditionally forced to entrust a ship's master with virtually all decisions during the months or years between calls at homeport,³⁹ modern communications allow the ship's owners and operators to make decisions in near real time no matter where the ship is located. At least one pair of scholars has credited the role of the ship owners in two famous disasters (the 1978 Amoco Cadiz supertanker grounding and the 1987 capsizing of the ferry Herald of Free Enterprise) with being at least partially responsible for the impetus to "reinforce the power of the person on the spot, who should have the authority to make proper decisions with regard to safety and environmental protection."⁴⁰ Professors K.X. Li and Jim Mi Ng both view the two incidents as proof that "decisions by those in . . . [the] office may sometimes be slow, improper or unsuitable."⁴¹

The IMO has recognized that the professional expertise of the master cannot be replaced through advances in communications that permit ship owners to be informed of events as they occur and has explicitly addressed in its regulations the authority of the master to make decisions on scene.⁴² The IMO is a specialized agency of the United Nations which is responsible for implementing and proposing measures to improve the safety and security of international shipping

39. See Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court's Subversion of New Deal Labor Law*, 25 BERKELEY J. EMP. & LAB. L. 275, 284 (2004) (describing the historic role of a ship's captain at sea as one of almost absolute autonomy).

40. See K.X. Li & Jim Mi Ng, *International Maritime Conventions: Seafarers' Safety and Human Rights*, 33 J. MAR. L. & COM. 381, 389-90 (2002) (explaining that advancements in communications technology "has shifted the making of shipboard decisions, even in emergencies, to the owner's or operator's shore-based staff.").

41. *Id.* at 389.

42. See *id.* at 390 n.49 (noting that the IMO passed a resolution encouraging states to afford shipmasters discretion and authority to make decisions related to maritime safety and marine environment protection without being constrained by ship owners).

and to prevent marine pollution from ships,⁴³ including the development of conventions and involvement in governmental regulation, legal matters, security issues, and the facilitation of international maritime traffic.⁴⁴ Notable examples of the IMO conventions, and their significant revisions, include: the International Convention for the Prevention of Pollution from Ships, 1973,⁴⁵ as modified by the Protocol of 1978 ("MARPOL 73/78") (pollution control procedures);⁴⁶ the 1995 amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (training to enhance safe operations);⁴⁷ and the 1995 revision to the 1974 Safety of Life at Sea Convention ("SOLAS"), along with codes that have come into force

43. The IMO was established by a Convention adopted under the United Nations on March 17, 1948, currently has 167 Member States. The Assembly meets once every two years with the various committees and subcommittees meeting at least once a year. See International Marine Organization, Frequently Asked Questions, available at http://www.imo.org/About/mainframe.asp?topic_id=774 (last visited Mar. 14, 2007) [hereinafter IMO FAQ]. The adoption of maritime legislation is still IMO's most important concern, and since its first meeting in 1959, the IMO has sought to improve maritime operations through conventions, binding on contracting states, which impose standards for various aspects of ship operations. *Id.* To date, approximately forty conventions and protocols have been adopted by the IMO, which are routinely amended to ensure they keep up to date with changes in the world of shipping. See Marine Policy: Shipping and Ports, http://www.who.edu/mpcweb/meetings/Luce_presentations/shipping%20and%20ports.pdf (last visited Mar. 14, 2007).

44. It is important to remember that the "IMO was established to *adopt* legislation. Governments are responsible for *implementing* it. When a Government accepts an IMO Convention it agrees to make it part of its own national law and to enforce it just like any other law. The problem is that some countries lack the expertise, experience and resources necessary to do this properly. Others perhaps put enforcement fairly low down their list of priorities." IMO FAQ, *supra* note 43. In moving forward with MIOs, it becomes clear that the IMO not only has the ability to address and "legislate" emerging issues of maritime safety, as it has done so in the past. However, as noted above, the problem is not one of "legislation" only, but rather implementation and enforcement.

45. See *generally* International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, T.I.A.S. No. 10561, 1340 U.N.T.S. 184.

46. Protocol of 1978 Relating to the International Convention for Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577.

47. 1995 Amendments to the Annex of the Convention on Standards of Training, Certification and Watchkeeping for Seafarers, July 7, 1995, STATE DEP'T No. 04-574, 1997 WL 33791187.

under SOLAS (safety of operations).⁴⁸ These conventions impose certification requirements necessary for ships to maintain their registry under the flag of a contracting state. Failure to obtain proper certification could lead a flag state to prevent a vessel from getting underway, or in the case of a coastal state, refusal to allow a ship to enter port.⁴⁹ This commercial sanction for noncompliance, with the attendant costs in lost revenue,⁵⁰ promotes the effectiveness of the IMO conventions.

Since 1985, with the hijacking of the Italian cruise ship *Achille Lauro*—which will be detailed later in the article—the IMO has continued to work towards the development and adoption of conventions and security regulations to address the safety and security threat posed by acts of terrorism.⁵¹ In at least three instances, the IMO has directly addressed the authority of the master: the 1995

48. See, e.g., Amendment to the International Convention for the Safety of Life at Sea, May 16, 1995, STATE DEP'T NO. 97-24, 1997 WL 78231 [1995 Amendment to SOLAS]; Amendments to the Annex to the International Convention for the Safety of Life at Sea of 1 November 1974, July 1, 1997, 1991 U.N.T.S. 220, ch. V, Reg. 10, available at <http://www.admiraltylawguide.com/conven/amendsolasannex1995.html>.

49. See, e.g., William R. Gallagher, President, International Registries, Inc., Speech at the Marine Money China Ship Finance Forum: Ship Mortgages as a Financing Vehicle: The Flag State's Role in Protecting the Security Interests of Lenders (Oct 15, 2004), available at [http://www.register-iri.com/content/artspoeche/WRG\\$ChinaOct.cfm](http://www.register-iri.com/content/artspoeche/WRG$ChinaOct.cfm) (observing that, between July 1 and October 15, 2004, the United States alone expelled, detained, or refused entry into port, nearly a hundred foreign ships for noncompliance with regulations, including proper certification requirements).

50. See *id.* (pointing out the costly nature of regulation noncompliance for shipowners). Noncompliance with international maritime regulations can result in large operational costs due to detentions by coastal states. *Id.*

51. See Chris Trelawny, *Maritime Security: Implementation of the ISPS Code* 2–3 (Paper presented at 3rd Intermodal Africa 2005 Tanzania Exhibition and Conference Feb. 3–4, 2005), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11698/ChrisTrelawny.doc (providing that following the 1985 *Achille Lauro* terrorism incident, the IMO adopted several resolutions to protect ship passengers and crewmembers, which ultimately led to the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation in 1988). In addition, after September 11th, the IMO passed a resolution to review existing international measures that were created to prevent and suppress terrorist acts against ships. *Id.* Subsequently, at a Diplomatic Conference on Maritime Security in December, 2002, the IMO adopted multiple security-related amendments to the SOLAS. *Id.*

Revision to SOLAS,⁵² the 1995 International Safety Management Code (ISM), which entered into force in 1998;⁵³ and Regulation 8 of the new chapter XI-2 in SOLAS, which enshrines the 2002 International Ship and Port Security (ISPS) Code.⁵⁴ Each instrument explicitly recognizes the master as having control over decisions on-scene.⁵⁵

The 1995 SOLAS revision, adding Regulation 10-1, states:

Master's discretion for safe navigation

The master shall not be constrained by the shipowner, charterer or any other person from taking any decision which, in the professional judgement of the master, is necessary for safe navigation, in particular in severe weather and in heavy seas.⁵⁶

Similarly, the ISM Code states:

Master's Responsibility And Authority

....

The Company should ensure that the safety management system operating on board the ship contains a clear statement emphasizing the master's authority. The Company should establish in the safety management system that the master has the overriding authority and the responsibility to make decisions with respect to safety and pollution prevention and to request the Company's assistance as may be necessary.⁵⁷

52. 1995 Annex Amendment to SOLAS, *supra* note 48, Reg. 10-1.

53. Amendment to the Annex to the International Convention for the Safety of Life at Sea, as Amended, July 1, 1998, STATE DEPT. NO. 98-125, 1998 WL 534054.

54. Amendments to the Annex of the International Convention for the Safety of Life at Sea, as Amended, Dec. 12, 2002, *available at* <http://www.admiraltylawguide.com/conven/amendsolas2002.pdf>. [hereinafter December 2002 Amendment to SOLAS]

55. *Id.*

56. 1995 Annex Amendment to SOLAS, *supra* note 48, Reg. 10-1.

57. International Safety Management (ISM) Code, Section 5, Master's

Most recently, and of most relevance to this discussion, the IMO adopted “a comprehensive set of measures to enhance the security of ships and port facilities, developed in response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States.”⁵⁸ Regulation 8 of SOLAS Chapter XI-2, special measures to enhance security, confirms the role of the master to exercise professional judgment over decisions necessary to maintain the security of the ship, by enshrining the section from the ISPS entitled “Master’s Discretion for Ship Safety and Security,” which provides:

1. The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship. This includes denial of access to persons (except those identified as duly authorized by a Contracting Government) or their effects and refusal to load cargo, including containers or other closed cargo transport units.

2. If, in the professional judgement of the master, a conflict between any safety and security requirements applicable to the ship arises during its operations, the master shall give effect to those requirements necessary to maintain the safety of the ship. In such cases, the master may implement temporary security measures and shall forthwith inform the Administration and, if appropriate, the Contracting Government in whose port the ship is operating or intends to enter. Any such temporary security measures under this regulation shall, to the highest possible degree, be commensurate with the prevailing security level. When such cases are identified, the Administration shall ensure that such

Responsibility and Authority,
http://www.imo.org/HumanElement/mainframe.asp?topic_id=287 (last visited Mar. 13, 2007).

58. International Maritime Organization, Frequently Asked Questions on Maritime Security, http://www.imo.org/Safety/mainframe.asp?topic_id=897#what (last visited Mar. 12, 2007) [hereinafter ISPS FAQs] (outlining the International Ship and Port Facility Security Code’s security measures as well as explaining the purpose and intent of these measures).

conflicts are resolved and that the possibility of recurrence is minimised.⁵⁹

Under Regulation XI-2/8, discretion over access to the vessel—or at least the authority to deny access—rests with the master.⁶⁰ Two points need to be considered in concert with this conclusion. First, when read in context, access most likely involves access of persons to a ship in port within a contracting state, rather than in international waters. Second, the IMO issued a circular in December of 2004 admonishing contracting states for failure to notify flag states and the IMO when taking control and compliance measures under ISPS.⁶¹ While the circular refers essentially to actions concerning security levels against ships entering the ports of contracting states, this explicit requirement for communication with the flag state and the IMO when taking action appears contrary to the argument that the master give consent.⁶² SOLAS and the ISM are consistent with traditional maritime law in their support for the authority of a master over his vessel, but provide additional guidance as to how far this authority extends.⁶³

59. See December 2002 Amendment to SOLAS, *supra* note 54, Reg. XI-2/8.

60. See *id.* Reg. 8(1) (denying “any other person” the ability to constrain a ship’s master from making decisions necessary for the ship’s safety and security).

61. See Circular, International Maritime Organization, Reminder of the Obligation to Notify Flag States When Exercising Control and Compliance Measures (Dec. 14, 2004) (MSC/Cir. 1133), available at www.imo.org/includes/blastdataonly.asp/data_id%3D10886/1133.pdf.

62. See *id.* (reminding each contracting government that when it has “taken control measures or steps against ship[,]” it must “notify flag States when exercising control and compliance measures”).

63. See IMO, *IMO Adopts Comprehensive Maritime Security Measures*, http://www.imo.org/Newsroom/mainframe.asp?topic_id=583&doc_id=2689#code (last visited Mar. 13, 2007) [hereinafter *IMO Adopts Security Measures*]. The ISPS Code also contemplates three levels of security. Security level 1 is the normal level at which the ship or port facility normally operates. Security level 2 is a heightened level for which appropriate additional protective security measures shall be maintained for a period of time. Security level 3 is an exceptional level which applies when there is a probable or imminent risk of a security incident. Further specific protective measures can be authorized under level 3. Ship and port facility security is a risk management activity, and as such focuses on the elimination of the source of the threat. In the context of this paper, this would include eliminating those who would commit acts of terrorism or otherwise threaten the security of ships or of the port facilities, which is essentially a government function. In order to determine what security measures are appropriate, governments must assess the threat and evaluate the risk of a potential unlawful act. Notwithstanding the fact

3. *The Master's Authority in Custom, Practice (and Lore) in Commercial Shipping*

Maritime law has long recognized the master's responsibility over the affairs of his ship.⁶⁴ The master's responsibility for, and authority over, his vessel has its source in commercial usages and jurisprudence dating back to the middle ages.⁶⁵ The safety of the vessel and its crew is not a responsibility that the master may defer or delegate, nor is it limited to situations where the vessel is in immediate danger.⁶⁶ The master's authority to act is derived from his duty to keep the vessel out of danger in the first place.⁶⁷

While the often-brutal discipline, apparently commonplace in the nineteenth century,⁶⁸ has faded, today's masters still retain

that each ship and each port is subject to different threats, the ISPS Code provides a standardized, consistent framework for managing risks and permitting the meaningful exchange and evaluation of information between Contracting governments, companies, port facilities, and ships. In order to communicate the threat at a port facility or for a ship and to initiate the appropriate response actions the Contracting government must set the appropriate security level. The security level creates a link between the ship and the port facility, since it triggers the implementation of appropriate security measures for the ship and for the port facility. As the potential threat increases, the only logical counteraction is to reduce vulnerability. The ISPS provides several ways to do so, and each ship and each port facility will have to determine the measures needed to intensify its security measures to appropriately offset the threat by reducing its vulnerability.

64. *See* *The Steamship Styria v. Morgan*, 186 U.S. 1, 9 (1902) ("The master of a ship is the person who is intrusted with the care and management of it, and the great trust reposed in him by the owners, and the great authority which the law has vested in him, require on his part and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention.")

65. *See* *The China*, 74 U.S. 53, 68 (1868) (noting that the shipmaster's authority includes the authority to displace a vessel pilot and recognizing that the master's broad authority aboard his ship originates from commercial jurisprudence from the middle ages).

66. *See* *United States Coast Guard v. Merchant Mariner's Document No. Z217567381*, Decision of Commandant, No. 1098 (Mar. 18, 1977) (holding that the shipmaster is the individual "primarily charged with the care and safety of the vessel and crew" and that the master must take steps to eliminate any "direct threat to the master's ability to carry out [such] duty," including conducting searches on crewmembers for contraband).

67. *See id.*

68. *See* *Chamberlain v. Chandler*, 5 F. Cas. 413, 414 (C.C.D. Mass. 1823) (Story, J.) (emphasizing the "summary, and often absolute" authority of a vessel master at sea, the near-impossibility of the passengers' ability to resist the master's harsh manners with "physical or moral force" and the consequent necessity of legal

considerable influence in the areas of commercial dealings, navigation, safety, and security. As one scholar states:

The master is charged with the safety of the ship and cargo; in his hands are the lives of passengers and crew. His position demands the exercise of all reasonable care and skill in navigation, of at least ordinary care and ability in the transaction of business connected with the ship, and the constant use of patience and consideration in his dealings with those under his command or entrusted to his care.⁶⁹

One Australian scholar, Professor Edgar Gold, has noted that:

The master's legal authority and responsibility . . . has been confirmed by numerous legal decisions in many states over a long period of time, despite the fact that it has never been set out in any international instrument. In other words, the master's authority and responsibility is something that is accepted in terms of customary law on a global basis.⁷⁰

restraints against the master should he resort to cruelty against his passengers); *Gould v. Christianson*, 10 F. Cas. 857, 863 (D.C.N.Y. 1836) ("A master has no authority to fall upon a mariner with blows for every inadvertency or act of misbehavior, unless the urgency to subdue him instantly or to resist some outrage threatened by him, be palpable."); *see also* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 89, 92–93 (1997) (discussing punitive damages in various cases awarded to passengers and crewmembers for the shipmaster's acts of cruelty); COBLESTONES: IRISH AND SCOTTISH FOLK 30 (Songbook 2004) (referring to the cruelty of shipmasters in song: "I have sailed with Burgess [the ship's master] once before/And I think I know him well/If a man is a seaman he can get along/and if not he is sure in hell"); JACK LONDON, *THE SEA WOLF* (Reader's Digest Assoc., Inc. 1989) (1904) (referring to the cruelty of sailing ship masters in a fictional account of the brutal master of the seal hunting schooner *Ghost*, Wolf Larsen).

69. Edgar Gold, *Command: Privilege or Peril? The Shipmaster's Legal Rights and Responsibilities* 7 (Background paper prepared for the 12th International Command Seminar, London May 21–23, 2003) *available at* <http://www.ifsma.org/fairtreatment/documents/commandGold.pdf> (citing H. HOLMAN, *A HANDY BOOK FOR SHIPOWNERS AND MASTERS* 5 (16th ed. 1964)). Without otherwise clearly stated legal limitations, the master is considered the legal agent for the ship and is responsible for its safety.

70. *Id.* at 7; *see also* Berlingieri, *supra* note 6, at 406 (noting that it is normal in admiralty matters for parties to be of different nationalities, and that nations have put in place agreements to standardize procedures, like procedures related to maritime liens, since the early part of the last century). For an example of this standardization see International Convention for the Unification of Certain Rules

Professor Gold's position on the universal acceptance of the master's authority over his vessel is consistent with the view taken in courts throughout the world on the master's ability to bind the vessel and vessel owner in commercial matters.⁷¹ Maritime law—the subset of commercial law that has governed relations between merchants, shippers, ship owners and operators since ancient times—has an international character that reflects the maritime industry it serves and the need for a mechanism to ensure the resolution of disputes arising from sea-borne commerce.⁷² Some issues frequently litigated in maritime cases concern the terms and conditions of delivering goods;⁷³ others involve the complementary relationship of vessels with the suppliers of goods and services where the vessel has an interest in continuing its voyage, and the supplier or service provider has an interest in ensuring payment by recourse to a lien on the vessel.⁷⁴

The authority of the commercial vessel master away from homeport to obligate his vessel⁷⁵ and the vessel's owner often plays a

Relating to Maritime Liens and Mortgages art. 2, Apr. 10, 1926, 27 AM. J. INT'L L. 28, 38 (Jan. 1933); International Convention for the Unification of Certain Rules Relating to Bills of Lading art. 3(1)(a), Aug. 25, 1924, 51 Stat. 233 (the "Hague Rules").

71. See, e.g., *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502 (1932) (exemplifying a case where the owner of a ferry was held liable for the deaths and injuries caused by the ferry's master). The master's decision to proceed through the waters at full-speed caused the ferry to be struck by ice, causing the ferry to sink. *Id.* at 507.

72. See, e.g., Gold, *supra* note 69, at 4 (explaining that UNCLOS provides coastal states authority to take certain actions when significant maritime accidents threaten their coastlines and territorial waters with pollution).

73. See *O'Brien v. Miller*, 168 U.S. 287, 304 (1897) (asserting that a ship's owner is civilly liable for delinquencies of the ship's captain); *Norwich Co. v. Wright*, 80 U.S. 104, 117 (1872) (analyzing historical opinions and asserting that a ship's owner is liable for losses of the ship and freight due to the shipmaster's actions).

74. See *Silver Star Enters. v. Saramacca MV*, 82 F.3d 666, 668 (5th Cir. 1996) (describing maritime liens and explaining that a lienholder may have the owner's ship be sold in order to obtain payment for the owner's debts).

75. The master can enter contracts resulting in maritime liens, e.g., bottomry: a debt akin to a ship's mortgage that the master can incur for necessities and ship repairs on behalf of the ship when away from homeport. See WILLIAM TETLEY & ROBERT WILKINS, *MARITIME LIENS AND CLAIMS*, 422–23 (2d ed. 1998). However, the need for large sums of capital for steel ships rendered bottomry bonds impractical in the Nineteenth Century. *Id.* at 473. Similarly, in the case of *Yildirim Gemi Insaat San. AS v. Vakiflar Bankasi TAO*, a ship was repaired at sea at the

central role in maritime law disputes.⁷⁶ This aspect of the master's control over the affairs of his vessel is universally recognized, even though related disputes over whether obligations undertaken were necessary and to what extent the authority to delegate control could be extended, are addressed around the world by maritime law practitioners. While the underlying rationale for delegating to the master the ability to bind the owner and the owner's ship has far less force in an era of advanced communications, the master's authority in the commercial realm remains considerable.⁷⁷ Today's masters still retain considerable influence in the areas of commercial dealings, navigation, safety, and security.⁷⁸ Commensurate with this responsibility is the authority to take proactive measures to assure the safety of the vessel and the voyage.

B. MASTER'S CONSENT TO SEARCHES OF HIS VESSEL

Reading together the historical authorities discussed above on maritime and international law, and taking into account the IMO

master's request, under the auspices of Article 1235, which allows shipmasters to execute maritime liens for repair expenses to continue the ship's voyage. *Yildirim Gemi Insaat San. AS v. Vakiflar Bankasi TAO*, 11. HD (11th Civ. Chamber, Ct. App., Sept. 12, 1999, E. 1998/397, K. 1998/397) (Turkish appellate decision construing section 1235 of the Maritime Law section of the Turkish Commercial Code) discussed in Hakan Karan, *Turkish Maritime Law Update*, 33 J. MAR. L. & COM, 371, 377 (2002).

76. For example, masters, or those signing on behalf of the master, commonly bind the ship owner to bills of lading for the carriage of cargo. See *Sunrise Maritime v. Unvisco*, (1998) 2 Lloyd's Rep. 287, 293 (Q.B.D.) (calling the principle "well established" in English case law); *Wehner v Dene Steam Shipping*, (1905) 2 K.B. 92 (ruling that a captain as an owner's agent can collect on freight bills and deduct moneys owed to other charter parties).

77. See *Gold*, *supra* note 69, at 8 ("it must be emphasized that these customary rules were not only developed in the sailing ship era, when communications were rudimentary, but also that they were principally created in order to assist shipping as a commercial enterprise"); see also *Berlingieri*, *supra* note 6, at 405 (discussing how the Polish husbanding agent argued that modern advances in communication technology rendered a narrow interpretation of the authority to bind the ship in Polish maritime law obsolete since the law originated when the master of the ship "acted as the only physical presence who could quickly communicate about services for the ship").

78. See *IMO Adopts Security Measures*, *supra* note 63 (setting forth the ISPS Code's comprehensive measures to enhance the security of ships and port facilities); see also *ISPS FAQs*, *supra* note 58 (providing insight into the purpose and intent of these security measures).

developments under 2002 revision to SOLAS Regulation XI-2/8 and the 2004 addition of SOLAS Regulation 34-1, a strong argument can be made that the ship's master does have the authority to consent to a search of his vessel for *safety and security reasons*, even in the modern era.

Applying this argument in the context of the war on terror, if a ship's master is informed that a suspected terrorist or WMD is on board his vessel, that master could consent to a boarding and search of the ship by a foreign state for the wanted individual or illegal cargo if the master believed the search to be necessary for *safety and security reasons* of the ship.⁷⁹ To suggest otherwise would undermine the ability of the ship master to ensure the safety and security of his vessel, including in the event of an emergency.

If, instead of a direct threat to the safety of the ship, the master became aware of a terrorist plot against a third country, or perhaps specifically against the country seeking to board and search the vessel, would the master still have the authority to consent? In either situation, foiling a terrorist plot requires swift and decisive action, and a flag state might be unreachable, or unable to decide whether to grant authority to board and search a vessel. While it is clear that flag-state consent would make the boarding permissible, what effect would a master's consent have on the legitimacy of the boarding and search?

There is, however, no direct authority to support the proposition that a master could consent to a boarding and search of his vessel without the consent of the flag state in order to thwart a terrorist plot, capture a terrorist suspect, or search for weapons that do not directly pose a threat to the safety and security of his ship.⁸⁰ Accordingly, in the absence of specific authority or a well-recognized custom and practice that would support the proposition that a master's control over his vessel authorizes decisions not tied to the safety or proper

79. See December 2002 Amendment to SOLAS, *supra* note 54, Reg. 8-1 (authorizing the master to execute decisions relating to the ship's safety and security without interference from others).

80. While other grounds may authorize a boarding with or without master's consent in the latter example, such as belligerent right of visit and search, for the purposes of this section we are simply exploring the right of the master to consent. See COMMANDER'S NAVAL HANDBOOK, *supra* note 27, at § 7.6.1 (describing the visit and search procedures by belligerent warships of merchant ships).

management of the vessel, the long-standing principle of flag-state jurisdiction should prevail.⁸¹ As a result, without the consent of the flag state, a ship harboring a terrorist who means no harm to the ship, but does intend harm to a third country, could not be boarded without additional authority.

C. MASTER'S CONSENT TO THE CAPTURE OF BIOMETRIC DATA FROM A CREWMEMBER

Again drawing from the historical and legal analysis above on the master's authority to consent to searches of his vessel, this section explores whether this right of search extends to crewmembers or passengers on board the vessel. Specifically, assuming that the master has properly consented to a boarding of his vessel for the safety and security of vessel—can the master consent to a search of a crewmember or passenger if such individual were suspected of being a terrorist? Following the logic from the previous section, the master's ability to consent should depend on whether the purpose of the search is to identify a terrorist that will harm the safety or security of his ship, or whether it is more broadly to capture a terrorist who may mean harm to others in the future, and is simply using the ship as a means of transport. If the search of the individual is for the purpose of identifying a terrorist that will harm the safety or security of his ship, then the master should have ability to search the individual crewmember or passenger. If the crewmember or passenger, instead, is a suspected terrorist that does not pose a specific threat to the safety or security of the master's ship, but rather poses a threat to some other entity in the future, then the master may not be able to rely on this authority to grant consent and should seek the approval of the flag state.

For those crewmembers or passengers who do pose a threat to the safety and security of the ship, it is important to analyze how far the master's consent to a "search" of the individual goes. Does such a search permit the taking of biometric data, for example, with the hopes of identifying the individual through an international terrorist database? This may be an important aspect of identifying a suspected terrorist that is traveling with false or no documents.

81. See UNCLOS, *supra* note 16, art. 92(1), 1833 U.N.T.S. at 433.

Biometrics is the automated capture of a person's unique biological data that distinguishes him or her from another individual.⁸² Recent technological developments have extended the collection of biometrics well beyond fingerprints and photographs. Biometrics can be measured and collected in many forms, including fingerprints, photographs, voice patterns, eye scans, facial recognition characteristics, and DNA analysis.⁸³ Pushing the above logic to the extreme, a ship master who has the ultimate responsibility for the safety and security of his vessel could consent to an extensive search of the vessel, which may include the collection of biometric data from crewmembers or individual passengers when necessary for the safety and security of his vessel. To suggest otherwise would perhaps limit the authority of the ship's master and could put the vessel at risk. However, there appears to be little direct authority that supports this position. In the event that the master's consent to such a search becomes subject to review in a domestic or international court, the success of the master's argument will likely depend upon whether the collection of biometric data from individuals for the purpose of identifying a potential terrorist was necessary for the safety and security of his vessel and, therefore, outweighed any privacy interest held by the individual crewmember or passenger in the collected data.

More broadly, however, does the individual crewmember or passenger have a reasonable right to privacy, and therefore have a right to refuse the collection of their personal biometric data even if

82. Biometrics is the automated capture of a person's unique biological data that distinguishes him or her from another individual. See Lynn Shotwell, *Return to the Virtual Border: Update from the Department of State and the Department of Homeland Security*, 1566 P.L.I./CORP. 91, 93 (2006).

83. Biometrics is personal information the collection of which may involve Fourth Amendment privacy issues under a U.S. Constitutional analysis, other privacy laws under the 1966 International Covenant on Civil and Political Rights (art. 17), and other regional human rights treaties, such as the European Convention on Human Rights. See, e.g., U.S. CONST. Amend. IV; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1992), 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (also known as the European Convention on Human Rights). For the purposes of this paper, the authors only address the U.S. constitutional analysis, and it will be assumed that the methods used for collection of biometrics will be minimally intrusive.

the ship's master has consented to a search of the vessel, its cargo, and its occupants? Within U.S. jurisprudence, privacy concerns raised about biometric data fall generally into two broad categories: collection and retention.⁸⁴ When the collection of biometric data is scrutinized through the lens of the U.S. Constitution, specifically a Fourth and Fifth Amendment analysis, there are no special protections involved in purely external characteristics.⁸⁵ Additionally, individuals can be ordered to engage in what is considered non-testimonial behavior for purposes of identification when there is a reasonable basis for doing so or other demonstrated governmental special needs.⁸⁶ The only limitation is that the collection of biometric data can not be based upon a lawless governmental intrusion.⁸⁷

Assuming a vessel has been lawfully boarded, the collection of biometric data that does not include bodily invasions—for example, taking note of eye and hair color, and facial scans—would likely pass muster under the U.S. Constitution.⁸⁸ A DNA blood draw, buccal swab, eye scans, or even finger-printing might not survive this constitutional analysis if such tests are viewed as intrusive. However, as the authors are unaware of direct authority applying this analysis

84. See Brigitte Wirtz, *Biometrics Systems 101 and Beyond: An Introduction to and Evaluation of the Technology and an Overview on Current Issues*, SECURE: SILICON TR. Q. REP., Autumn 2000, at 19, available at http://www.silicon-trust.com/html-data/pdf/secure_PDF/secure_PDF_alle/secure_alle.pdf (claiming that major privacy concerns include the unauthorized collection, disclosure, access, and use of biometric data).

85. See generally *Katz v. United States*, 389 U.S. 347, 351 (1967) (the seminal U.S. Supreme Court case on Fourth Amendment search and seizure, the Court held that “the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).

86. See, e.g., *Schmerber v. California*, 384 U.S. 757, 764 (1966) (recognizing that many federal and state courts do not offer “protection against compulsion to submit to fingerprinting, photographing, or measurements . . . for identification”). Recent cases addressing the special needs exception and administrative search exceptions related to terrorist threats include *MacWade v. Kelly*, 2005 WL 3338573, at *15–19 (S.D.N.Y. Dec. 7, 2005) and *American-Arab Anti-Discrimination Committee v. MBTA*, 2004 U.S. Dist LEXIS 14345, at *3–6 (D. Mass July 28, 2004).

87. See *Hayes v. Florida*, 470 U.S. 811 (1985) (holding that an individual's fingerprints were illegally obtained by the state because the individual was transported and detained without probable cause or judicial authorization).

88. See U.S. CONST. Amend. IV.

internationally, clear guidelines should be established for the collection of biometrics in any authorized boarding. It would seem prudent that any proposed guidelines be consistent with U.S. constitutional standards and any national legal authority of participating coalition partners. Additionally, proposed guidelines should set forth a framework for the retention of biometric data after it is collected.⁸⁹

II. UNSCRS AS A BASIS FOR BOARDINGS AND SEARCHES: HISTORICAL PRECEDENT FOR USE OF MARITIME INTERCEPTION OPERATIONS

MIOs in Rhodesia, Iraq, Haiti, and Yugoslavia have been authorized during the last forty years pursuant to UNSCRs.⁹⁰ The following examples provide insight as to the decision-making process and the limitations that such MIOs face. One trend this

89. Concerns have been expressed about governmental maintenance of biometrics data banks. *See Wirtz, supra* note 84, at 19. These concerns range from unfocused fears of unnecessary and intrusive governmental oversight to potential abuse of sensitive information contained in data banks. Unauthorized access, use or disclosure of biometric identifiers can threaten an individual's privacy interests. However, if the collection of biometric data is to have any utility, a data bank must be maintained. *Id.* at 43. Maintenance of data banks containing personal information is nothing new for both governmental and private entities and there already exists a body of law, governmental rules, and regulations controlling the use of existing systems of records, such as the Privacy Act of 1974 and the Freedom of Information Act. *See, e.g.,* Privacy Act of 1974, 5 U.S.C. § 552a (2000); Freedom of Information Act, 5 U.S.C. § 552 (2000). Review of current rules and regulations in light of new technologies and operational considerations may be appropriate. At a minimum, maintenance of any data collected should be in compliance with existing laws pertaining to governmental records systems. This may or may not be relevant for the purposes of boarding a vessel as the DNA may not be "collected" for retention, but rather to match up to an existing profile in a terrorist database. It may be necessary if such DNA is necessary to link this particular suspected terrorist to a crime in the United States or through an extradition request elsewhere.

90. These UNSCRs authorize Member States to take necessary actions to enforce embargoes upon specified nations. *See, e.g.,* S.C. Res. 221, U.N. Doc. S/RES/221 (Apr. 9, 1966); S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966); S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992); S.C. Res. 943, U.N. Doc. S/RES/943 (Nov. 29, 1990); S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993).

section highlights is that the concepts of embargo and boycott have ultimately merged into what has become MIOs.⁹¹

A. RHODESIA

In 1966 and 1968, the U.N. Security Council authorized MIOs against Southern Rhodesia (modern-day Zimbabwe).⁹² Rhodesia—settled under the wing of the British South Africa Company, and became a self-governing colony in 1923—was moving towards independence after a federation was established in 1953 between the two Rhodesias (modern-day Zambia and Zimbabwe) and Nyasaland (modern day Malawi).⁹³ In the early 1960s, the situation became violent. The 1961 Constitution, introduced by Southern Rhodesia, limited the powers of the United Kingdom, and as the authority of the British Government began to dwindle, the British Government tried to push back the Southern Rhodesian rebellion.⁹⁴ On October 27, 1964, the British Government formally stated that “[t]he only way Southern Rhodesia can become a sovereign independent State is by an Act of the British Parliament.”⁹⁵ This pronouncement supported the British view that Southern Rhodesia was not a self-governing territory, and that the United Nations could not interfere with it as it fell under the domestic jurisdiction of the United Kingdom.⁹⁶

91. See COMMANDER'S NAVAL HANDBOOK, *supra* note 27, at § 4.1.1 (discussing provisions of the Charter of the United Nations that allow embargo and boycott measures and stating that such measures are economic measures used to influence the conduct of the targeted nations).

92. Authorizing these operations, the United Nations mandated Member States to prevent Rhodesian imports from entering their territories and also mandated that Member States implement specified embargoes on Rhodesia. See S.C. Res. 221, *supra* note 90; S.C. Res. 232, *supra* note 90; S.C. Res. 253, *supra* note 90.

93. See J.E.S. Fawcett, *Security Council Resolutions on Rhodesia*, 41 BRIT. Y.B. INT'L L. 103, 103–04 (1968) (discussing British control over Rhodesia in early twentieth century, which was not based on a strong assertion of power by the British).

94. See *id.* at 107 (providing that Southern Rhodesia considered Britain's remaining powers under the 1961 Constitution as being limited to “those features of the Constitution affecting the position of the Sovereign and the Governor’ and to the disallowance of legislation which appears inconsistent with the treaty obligations of the United Kingdom towards any country or international organization, or with undertakings in respect of loans under the Colonial Stock Acts”).

95. *Id.* (citation omitted in original).

96. See *id.* at 108 (noting that the United Kingdom's assertion that Southern

Nonetheless, in 1964, the U.N. Committee of “twenty four” nations adopted a subcommittee report on Rhodesia which attracted the attention of the Security Council.⁹⁷ The U.N. Security Council then adopted a resolution on May 6, 1965, the month that Rhodesian elections were scheduled, which requested U.N. Member States not to recognize a declaration of independence by Rhodesia and urged the establishment of a constitutional conference.⁹⁸ In the face of growing pressure as the year wore on, on November 11, 1965, Rhodesia’s Smith regime declared unilaterally that Rhodesia was independent.⁹⁹ In response, two more forceful U.N. Security Council resolutions were adopted, Resolutions 216 and 217, with the latter calling upon the United Kingdom to “quell this rebellion . . . [and] take all other appropriate measures which would prove effective in eliminating the authority of the usurpers and in bringing the minority regime in Southern Rhodesia to an immediate end.”¹⁰⁰ While four U.N. Security Council resolutions were subsequently adopted, for the purposes of this article, we will focus only on the economic embargoes.

In 1966, UNSCR 221 called “upon all States to ensure the diversion of any of their vessels reasonably believed to be carrying oil destined for Southern Rhodesia which may be en route for Beira,”

Rhodesia was a self-governing territory for U.N. classification purposes conflicted with its assertion that the United Nations could not interfere with Southern Rhodesian affairs). The United Kingdom claimed exclusive jurisdiction over South Rhodesia. *Id.*

97. *See id.* (providing that the Committee of “twenty four” met with U.K. Ministers of London before preparing its report on Southern Rhodesia).

98. *See* S.C. Res. 202, ¶¶ 3, 6, U.N. Doc. S/RES/202 (May 6, 1965); *see also*, Fawcett, *supra* note 93, at 108–09 (describing two additional resolutions that the General Assembly adopted after Resolution 202 due to the increasing threat of Southern Rhodesian independence). The first resolution was a stronger version of Resolution 202, and the second resolution authorized the United Kingdom to use military force if necessary to prevent Southern Rhodesian independence. *Id.* at 109.

99. *See* Fawcett, *supra* note 93, at 109 (noting that the General Assembly immediately adopted a resolution condemning Southern Rhodesia’s unilateral declaration of independence).

100. S.C. Res. 217, ¶¶ 4–5, U.N. Doc. S/RES/217 (Nov. 20, 1965); *see* S.C. Res. 216, ¶¶ 1–2, U.N. Doc. S/RES/216 (Nov. 12, 1965) (in Resolution 216, the U.N. Security Council “condemn[ed] the unilateral declaration of independence made by [the] racist minority in Southern Rhodesia; and . . . call[ed] upon all States not to recognize th[e] illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to th[e] illegal regime”).

called “upon the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia, and empower[ed] the United Kingdom to arrest and detain the tanker known as Joanna V upon her departure from Beira in the event her oil cargo is discharged there.”¹⁰¹ Pursuant to this authority, H.M.S. Berwick intercepted a tanker, Manuela, on the high seas, and advised the master of the vessel that the tanker would not be able to continue to Beira,¹⁰² in accordance with UNSCR 221.¹⁰³ The Manuela’s master did not immediately consent to a boarding, so an armed party of naval officials boarded the ship and stayed until the master agreed to change his destination.¹⁰⁴ While Article 22 of the Convention on the High Seas, adopted in 1958 and the predecessor to UNCLOS, limited the right of a warship at that time to board a merchant ship “[e]xcept where acts of interference derive from powers conferred by treaty,” the fact that the boarding was carried out as pursuant to a lawful UNSCR would normally permit a state to carry out an act that would be illegal absent a Security Council resolution.¹⁰⁵

While this authority seems patently clear on its face, due to a feeling of uncertainty of authorities laid out in previous UNSCRs, UNSCR 232, adopted on December 6, 1966, was even clearer.¹⁰⁶ It stated that, “[a]cting in accordance with Articles 39 and 41 of the United Nations Charter,” the U.N. Security Council “[d]ecides that all States Members of the United Nations shall prevent” commerce with Rhodesia, including imports and exports of commodities, the

101. S.C. Res. 221, *supra* note 90, ¶¶ 4–5 (emphasis added); see Fawcett, *supra* note 93, at 118.

102. See Fawcett, *supra* note 93, at 118.

103. S.C. Res. 221, *supra* note 90.

104. See Fawcett, *supra* note 93, at 118.

105. Convention on the High Seas, art. 22, Apr. 29, 1958, 450 U.N.T.S. 82, 92 (entered into force Sept. 30, 1962); see Fawcett, *supra* note 93, at 120–21 (explaining that the Security Council Resolution, authorizing military force, was a proper exercise of the Security Council’s recommendation powers under Article 39 of the U.N. Charter). “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations . . . to maintain or restore international peace and security.” Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 39.

106. See S.C. Res. 232, *supra* note 90.

sale or shipment of arms, and the supply of oil or oil products.¹⁰⁷ Although its language was clearer than that in previous resolutions, UNSCR 232 still failed to provide a mechanism through which these actions could be coordinated.¹⁰⁸ Nonetheless, on January 5, 1967, U.S. President Lyndon B. Johnson signed U.S. Executive Order 11,322 Relating to Trade and Other Transactions Involving Southern Rhodesia, which prohibited imports of key commodities from Rhodesia into the United States,¹⁰⁹ and virtually mirrored the remaining U.N. Security Council prohibitions.¹¹⁰

UNSCR 253, adopted on May 29, 1968, was even more unequivocal.¹¹¹ It effectuated an embargo on all goods from Rhodesia, prohibited all financial lending to, or investment in, Rhodesia, and prohibited the entry of any individuals carrying a Southern Rhodesian passport into other U.N. Member States.¹¹²

Acting under Chapter VII of the Charter of the United Nations, [the Resolution:]. . . [d]ecides that . . . all States Members of the United Nations shall prevent: (a) The import into their territories of all commodities and products originating in Southern Rhodesia. . . . (b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export of any commodities or products from Southern Rhodesia (c) . . . [T]he carriage (whether or not in bond) by land transport facilities across their territories of any commodities or products originating in Southern Rhodesia (d) The sale or supply by their

107. *Id.*; see also Fawcett, *supra* note 93, at 121 (observing that the clear purpose and firm foundation of Resolution 232 distinguish it from previous resolutions regarding Southern Rhodesia).

108. See Fawcett, *supra* note 93, at 121 (explaining that by neglecting to provide a mechanism in the form of a committee, to ensure coordination of measures taken, the Security Council ignored the advice of an Expert Committee that explicitly recommended such a committee).

109. See Exec. Order No. 11322, 32 Fed. Reg. 119 (Jan. 7, 1967). The Executive Order prohibited "importation into the United States of asbestos, iron ore, chrome, pig-iron, sugar, tobacco, copper, meat and meat products, and hides, skins and leather originating in Southern Rhodesia and exported therefrom after December 16, 1966, or products made therefrom in Southern Rhodesia or elsewhere." *Id.*

110. See S.C. Res. 232, *supra* note 90, ¶ 2 (barring the importation of asbestos, various metals, sugar, tobacco, meat products, and animal skin products that originate from Southern Rhodesia).

111. See S.C. Res. 253, U.N. Doc. S/RES/253 (May 29, 1968).

112. See *id.* ¶¶ 3-5.

nationals or from their territories of any commodities or products. . . .¹¹³

The U.N. Security Council, using its powers in a UNSCR, had effectively cut Rhodesia off from the world, enforcing a regime of sanctions through the use of authorized MIOs.

B. IRAQ

Iraq was the first in a series of MIOs carried out by the United States and other allies in the 1990s.¹¹⁴ Three MIOs were carried out in different parts of the world, including the Persian Gulf and Red Sea against Iraq, the Adriatic Sea off of the coast of the former Yugoslavia, and the Caribbean off of the coast of Haiti.¹¹⁵

Following Iraq's invasion of Kuwait in August 1990, the U.N. Security Council, in UNSCR 661, called on Member States to prevent the import of "all commodities and products originating in Iraq or Kuwait exported there-from after the date of the present resolution."¹¹⁶ The resolution also prohibited the transfer of money and the sale or supply of any commodities or products to Iraq or Kuwait, other than medical supplies and food if humanitarian circumstances presented.¹¹⁷ Based on a broad interpretation of this resolution, coupled with a request by Kuwait for assistance and the inherent right of self-defense under Article 51 of the U.N. Charter, the United States began MIOs, and other nations followed.¹¹⁸

113. *Id.* ¶¶ 1, 3(a)–(d).

114. *See generally* Richard Zeigler, *Ubi Sumus? Quo Vadimus?: Charting the Course of Maritime Interception Operations*, 43 NAVAL L. REV. 1, 26–35 (1996) (describing a series of three multilateral MIOs, which began in 1990 with the MIO against Iraq).

115. *See id.* (describing the three MIOs and legal justifications used by various nations such as the United States for undertaking them). The states involved in the 1990 MIO against Iraq justified the operation under the inherent right of self-defense and the U.N. Charter's authority. *See id.* at 31.

116. S.C. Res. 661, ¶ 3(a), U.N. Doc. S/RES/661 (Aug. 6, 1990); *see also* Jane Gilliland Dalton, *The Influence of Law on Seapower in Desert Shield/Desert Storm*, 41 NAVAL L. REV. 27, 30 (1993) (noting that the resolution preceding Resolution 661, unlike the latter, only condemned Iraq's invasion of Kuwait and did not require members to take action).

117. *See* S.C. Res. 661, *supra* note 116, ¶ 3(b)–(c).

118. *See* Zeigler, *supra* note 114, at 28 (providing that Resolution 661 did not specify whether unilateral or multilateral MIOs were permissible under its auspices).

A Multinational Interception Force, designed to enforce these U.N. sanctions, was established.¹¹⁹ Cuba, among other countries, did not interpret the UNSCR so broadly, and urged the U.N. Security Council to condemn these “unilateral enforcement” actions.¹²⁰ The U.N. Secretary General of the time, Perez de Cuellar, supported this concern, stating that “only the United Nations, through its Security Council Resolutions, can really decide about a blockade.”¹²¹ Accordingly, on November 29, 1990, the U.N. Security Council authorized U.N. “Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the above-mentioned resolutions, to use all necessary means to uphold and implement resolution 660 (1990).”¹²² “All necessary means” is explicit U.N. Security Council authority for a MIO, and at a minimum, could be viewed as an endorsement of the regime of MIOs that was underway.¹²³

The purpose of the MIO was to prevent the Iraqi government from selling and earning a profit from contraband oil in violation of the UNSCRs.¹²⁴ If a ship had to be boarded, every effort was made not to cause undue hardship to the ship or its crew.¹²⁵ To demonstrate compliance with the embargo, the ship had to have its entire contents

and that the United States interpreted Resolution 661 broadly by acting unilaterally).

119. See LOIS E. FIELDING, *MARITIME INTERCEPTION AND U.N. SANCTIONS: RESOLVING ISSUES IN THE PERSIAN GULF WAR, THE CONFLICT IN THE FORMER YUGOSLAVIA, AND THE HAITI CRISIS* 368, xxii (1997) (providing that the Multinational Interception Force included over “forty-five U.S. ships and 15,000 U.S. personnel and more than thirty ships from foreign forces”). Twenty of the Multinational Interception Force ships were designated to be used exclusively for MIOs. *Id.*

120. Zeigler, *supra* note 114, at 28 (noting that Cuba was the most outspoken and adamant nation to condemn unilateral enforcement actions).

121. *Id.*

122. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

123. See *id.*

124. See Peter Sinton, *The Smuggler Sleuths Lab 'Fingerprints' Oil to Enforce Iraq Embargo*, SAN FRANCISCO CHRONICLE, Dec. 21, 1996, at D1 (describing the process by which a U.S. Customs Service lab in San Francisco detected oil originating from Iraq). This lab played a critical role in preventing Iraq from smuggling contraband oil from its shores. *Id.*

125. See Dalton, *supra* note 116, at 56 (noting that, if a boarding and search took several hours, the crew was usually permitted to observe their mealtimes and engage in prayer).

accessible along with complete paperwork, otherwise the ship would be diverted for further inspection.¹²⁶ The U.S. Coast Guard played a large role in the MIO, due to its experience with boardings related to drug and contraband smuggling in and about the territorial waters of the United States.¹²⁷

When Desert Storm began on January 17, 1991, following the January 15 deadline set forth in UNSCR 678, additional authority to conduct MIOs emerged.¹²⁸ All parties, including Iraqis, were belligerents. Under the law of war, “[e]nemy merchant vessels . . . may be captured at sea whenever located beyond neutral territory. Prior exercise of visit and search is not required . . . [w]hen military circumstances preclude . . . adjudication as an enemy prize, [and the vessel] may be destroyed after all possible measures are taken to provide for the safety of passengers and crew.”¹²⁹

The smuggling of Iraqi oil began in the early 1990s. Although smugglers initially used tankers and larger cargo ships, they later changed to smaller ships, thirty to forty meter “dhows,”¹³⁰ to make it more difficult for the Maritime Interception Force. The use of dhows was effective and temporarily resulted in fewer interceptions.¹³¹ The

126. *See id.* (stating that ships were diverted if there was even the slightest bit of discrepancy in their paperwork or the smallest portion of their cargo was unavailable for inspection).

127. *See id.* (explaining that the U.S. Coast Guard’s seasoned performance in maritime interdictions owed largely to their knowledge of commercial shipping documents and likely hiding places for contrabands on merchant vessels).

128. *See id.* at 68–69 (describing significant changes that were made in the status of Iraqi merchant vessels’ after Desert Storm began, which made it more precarious for such vessels to be out at sea). However, the MIO had few encounters with Iraqi merchant vessels during Dessert Storm. *Id.* at 70.

129. *Id.* at 69; *see* COMMANDER’S NAVAL HANDBOOK, *supra* note 27, at § 8.2.2 (describing the capture procedures of enemy merchant vessels and civilian aircraft).

130. *See* Michael R. Gordon, *Threats and Responses: With Allies Likely and Unlikely, U.S. Navy Stems Flow of Iraqi Oil*, N.Y. TIMES, Oct. 29, 2002, at A2 (providing that smugglers in large vessels employed various tactics to impede detection of Iraqi oil by searchers, including hiding oil under piles of hay or cement floors). Despite their size, dhows can individually hold up to several hundred metric tons of oil. *Id.*

131. *See* Howard Schneider, *Review of Iraq Sanctions Reflects ‘State of Disarray’; U.S. Seeks Response to Erosion of Restrictions*, WASH. POST, Mar 3, 2001, at A14 (noting that, after smugglers began using dhows, which tend to travel within national territorial waters, it became “too difficult for the current enforcement system to monitor such ships while also trying to keep larger, oil

MIO continued throughout the 1990s until the beginning of the Iraq War in 2003.¹³² During that time period, the Maritime Interception Force made over forty thousand queries of ships, boarded approximately seventeen and a half thousand ships, and diverted approximately two thousand ships from entering Iraq.¹³³ Even as late as 2003, in the first week of the year alone, the Maritime Interception Force made 113 queries of ships, boarded sixty-three ships, and diverted nineteen ships.¹³⁴

C. FORMER YUGOSLAVIA

In response to increasing ethnic strife in the region, U.N. Security Council Resolution 757 of 1992 laid out prohibitions on the sale or supply to the Federal Republic of Yugoslavia, now Serbia and Montenegro respectively, of all commodities or products that were not medical supplies or foodstuffs.¹³⁵ U.N. Security Council Resolution 943 reaffirmed this embargo, stating that all restrictions against the Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina, including the aircraft embargo, the ferry service, and participation of sporting goods and cultural exchanges, “shall be suspended” for a time period until after the Secretary General issues a report that the authorities of the Federal Republic of Yugoslavia are “implementing their decision to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Republic of Bosnia and Herzegovina with respect to all goods except foodstuffs, medical supplies and clothing for essential humanitarian needs.”¹³⁶ The Resolution further required the Secretary General to submit reports every thirty days on whether

bearing vessels from leaving the country”).

132. See Christopher Munsey, *Gulf Boarding Operations: Steady Work, Risky Business*, NAVY TIMES, May 10, 2004, at 15 (stating that the MIO mission changed in 2003 with the inception of the Iraq war, whereby coalition forces of Operation Iraqi Freedom now focused on maritime security for Iraq).

133. See *id.* (listing figures reflecting MIO interception efforts in 2002, whereby MIO ships stopped five thousand vessels, boarded 2,920 vessels, and diverted 890 vessels for additional inspections).

134. See *id.*

135. See S.C. Res. 757, ¶ 4, U.N. Doc. S/RES/757 (May 30, 1992).

136. S.C. Res. 943, ¶¶ 1, 3, U.N. Doc. S/RES/943 (Sept. 23, 1994).

the authorities of the Federal Republic of Yugoslavia had effectively closed the border.¹³⁷

D. HAITI

In 1993, Haiti was led by a brutal military dictatorship headed by Raoul Cedras, after the democratically elected President Jean-Bertrand Aristide was forced into exile.¹³⁸ Haiti's military and police authorities cracked down severely on Haitian citizens, arresting and killing them, and destroying their property.¹³⁹ In UNSCR 841 of 1993, the United Nations "[d]ecide[d] to prohibit any and all traffic from entering the territory or territorial sea of Haiti carrying petroleum or petroleum products, or arms and related *matériel* of all types, including weapons and ammunition, military vehicles and equipment. . . ."¹⁴⁰ The United States and members of the international community, pursuant to UNSCR 867 (establishing the U.N. Mission in Haiti (UNMIH)), officially began military action against Haiti in 1993.¹⁴¹ This operation became known as "Operation Restore Democracy."¹⁴² The military authorities of Haiti obstructed

137. *See id.*

138. *See* Kenneth Freed, *Cedras Resigns in Haiti, Ending Brutal Regime; Caribbean: Military Leader, Chief of Staff Quit Under U.S. Pressure. Move Clears Way for Return of Aristide*, L.A. TIMES, Oct. 11, 1994, at A1 (declaring the end of a "three year[] . . . brutal and corrupt military dictatorship" under Lt. Gen. Raoul Cedras, which commenced when the army drove Aristide from office). Aristide was Haiti's first democratically elected president. *Id.*

139. *See* Mike Dorning, *Under Aristide, Haiti's Judicial System Remains Corrupt; 'Justice' Slow, Sometimes Administered by Oppressors*, CHI. TRIBUNE, Feb. 26, 1995, at 13 (reporting that Cedras' allies are believed to have killed over 3,000 people and to have beaten, raped, or robbed even more individuals); *see also* President William J. Clinton, *Letter to Congress on Deployment of U.S. Armed Forces to Haiti* 4 DEP'T OF STATE DISPATCH 766 (Nov. 1, 1993) (describing actions by Haiti military as "lawless, brutal actions" that undermine the Haitian people's "manifest desire for democracy").

140. S.C. Res. 841, ¶ 6, U.N. Doc. S/RES/841 (Jun. 16, 1993).

141. *See* S.C. Res. 867, ¶ 1, U.N. Doc. S/RES/867 (Sep. 23, 1993) (approving the establishment and dispatch of the U.N. Mission in Haiti for six months, subject to possible extension).

142. *See* Clinton, *supra* note 139 (indicating that, as part of Operation Restore Democracy, the United States deployed U.S. Navy ships to conduct interception operations); *see also* S.C. Res. 873, ¶ 1, U.N. Doc. S/RES/873 (Oct. 13, 1993) (deciding to effectuate the measures listed in Resolution 841, such as the oil embargo, unless the parties to the Governors Island Agreement implement the agreement to reinstate President Aristide); S.C. Res. 841, *supra* note 140, ¶ 16

the UNMIH, which was acting under U.S. command and control, together with allied nations and in cooperation with the legitimate government of Haiti.¹⁴³

The U.N. Security Council adopted Resolution 875 on October 16, 1993, which called upon Member States “to use such measures commensurate with the specific circumstances as may be necessary . . . to ensure strict implementation of” the Haiti embargo on petroleum and arms and related material imposed by U.N. Security Council Resolutions 841 and 873, “and in particular to *halt inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations.*”¹⁴⁴ As a result of Resolution 875, U.S. naval forces began a MIO on October 18, 1993, to ensure compliance with the embargo on Haiti,¹⁴⁵ and more broadly, as part of the U.S. and international efforts to restore democracy in Haiti and to promote democracy in the region.¹⁴⁶

During the time of these MIOs, the U.S. Navy conducted enforcement operations around Haiti both within and outside of its territorial sea.¹⁴⁷ The initial MIO included six U.S. Navy ships and support elements from the U.S. Atlantic Command.¹⁴⁸ Subsequent MIOs were comprised of up to six U.S. Navy ships in the approaches to the Haitian ports, and the Maritime Interception Force also

(expressing “readiness” to assess restrictions “with a view of lifting them” if the “de facto” Haitian authorities sign and implement in good faith, an agreement to reinstate President Aristide).

143. See President William J. Clinton, *A Further Report on the Status of the U.S. Contribution to the Ongoing United Nations Embargo Enforcement Effort of Haiti*, H.R. Doc. No. 103-241, at 1 (Apr. 20, 1994) [hereinafter H.R. Doc. No. 103-241] (reporting that in response to Haitian military authorities’ ongoing obstruction of UNMIH dispatch, the Security Council adopted Resolution 875).

144. S.C. Res. 875, ¶ 1, U.N. Doc. S/RES/875 (Jun. 16, 1993) (emphasis added). See Clinton, *supra* note 139 (characterizing the enforcement regime under Resolution 875 as meant to “ensure strict implementation of” Resolutions 841 and 873).

145. See H.R. Doc. No. 103-241, *supra* note 143, at 1 (noting that U.S. Navy Forces serve at stations near Haitian ports).

146. See Clinton, *supra* note 139, at 766 (referring to Operation Restore Democracy as a measure consistent with American policy of supporting democracy in Haiti).

147. See H.R. Doc. No. 103-241, *supra* note 143, at 1.

148. See Clinton, *supra* note 139, at 766 (stating that among other tasks, the U.S. Navy ships were deployed to monitor merchant ships entering Haiti shores so that they comply with U.N. embargoes against Haiti).

consisted of navy and support elements from Argentina, Canada, France, the Netherlands, and the United Kingdom.¹⁴⁹ The purpose of the MIOs was to ensure that any merchant vessel traveling to Haiti was in compliance with the sanctions and embargo.¹⁵⁰ By April, 1994, more than 6,000 vessels had been stopped, more than 700 had been boarded, and approximately 44 had been diverted to other non-Haitian ports for further inspection.¹⁵¹ By July 1994, however, it was clear that sanctions alone were inadequate to restore democracy to Haiti. As a result, the U.N. Security Council issued UNSCR 940, which authorized the “use [of] all necessary means” to ensure a departure of the military leadership and the restoration of Aristide to power in Haiti.¹⁵² In response, the U.S. military deployed to Haiti to remove Cedras and restore Aristide to power.¹⁵³

UNSCR 944, adopted September 29, 1994, called for the termination of “measures regarding Haiti set out in” UNSCRs 841, 873, and 917 “at 0001 a.m. EST on the day after the return to Haiti of President Jean-Bertrand Aristide.”¹⁵⁴ Aristide returned to power in October 1994, and there was a peaceful resolution of the crisis.¹⁵⁵ The U.N. Security Council, in UNSCR 944 of 1994, ended the military action and the sanctions against Haiti.¹⁵⁶ It is believed that the MIO in Haiti was effective in preventing the sale of embargoed items, and did put pressure on the Cedras government which ultimately resulted in Cedras stepping down.¹⁵⁷

149. See H.R. Doc. No. 103-241, *supra* note 143, at 1.

150. See *id.*

151. See *id.* (noting that that these operations successfully deterred use of tankers for oil shipments).

152. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

153. See Zeigler, *supra* note 114, at 35 (providing that the United States spearheaded coalition efforts to reinstate President Aristide).

154. S.C. Res. 944, ¶ 4, U.N. Doc. S/RES/944 (Sept. 29, 1994).

155. See Zeigler, *supra* note 114, at 35 (detailing the rise and fall of Cedras, as well as the return of Aristide).

156. See S.C. Res. 944, *supra* note 154, ¶ 4 (repealing the measures adopted against Haiti in UNSCRs 841, 873, and 917); see also S.C. Res. 841, *supra* note 140, ¶¶ 5–8 (mandating among other restrictions, that states stop supplying military equipment and oil to Haiti); S.C. Res. 873, *supra* note 142, ¶ 1 (deciding to reinstate the sanctions of UNSCR 841); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994) (placing restrictions on Haiti in order to implement the Governors Island Agreement and restore political stability in Haiti).

157. See H.R. Doc. No. 103-241, *supra* note 143, at 1; Zeigler, *supra* note 114, at 35.

As evident from the preceding sections related to Iraq, the former Yugoslavia, and Haiti, all of the MIOs were multinational,¹⁵⁸ and all were conducted in accordance with a UNSCR. While, historically, customary international law or other parts of the law of neutrality served as authority for blockades, modern multinational MIOs are a post-World War II creation, relying upon the U.N. Charter for authority, and UNSCRs for specific authorization.¹⁵⁹ Analyzing these operations, it is clear that a specific UNSCR authorizing MIOs against terrorists or weapons used by terrorists in connection with a particular conflict or more generally is consistent with international law and precedent. Likewise, language authorizing “all necessary means” in a particular conflict or more generally to combat terrorism, would also support the use of MIOs. We will explore, in the next three sections, MIOs that were not clearly and specifically authorized by a UNSCR. These include Leadership Interception Operations in Afghanistan, arising from Operation Enduring Freedom, the Israeli Karine-A Incident occurring in 2002, and more generally, the War on Terror.

III. MODERN MARITIME INTERCEPTION OPERATIONS IN THE WAR ON TERROR

Following the September 11, 2001 attacks on the World Trade Center and the Pentagon, the United States began what has come to be known as a “Global War on Terror,” or simply the “War on Terror,” against Al-Qaeda, the Taliban, and their affiliates.¹⁶⁰ After 9/11, as part of the global war on terrorism, it has been alleged that modern MIOs have been conducted in key areas to deter, deny, and

158. See Zeigler, *supra* note 114, at 2 (characterizing the MIOs in the named regions as “multinational,” but explaining that the MIOs were actually “national in practice” because nations followed their own protocols when carrying out the operations). Each nation implemented its own practices for “command and control, rules of engagement, and communications” procedures. See *id.*

159. See *id.* at 19 (stating that the distinction between authority from customary international law and authority from the U.N. Charter is important because in the latter situation, MIO forms are controlled largely by Security Council resolutions).

160. See Richard W. Stevenson, *President Makes It Clear: Phrase Is ‘War On Terror’*, N.Y. TIMES, Aug. 4, 2005, at A01 (reporting President Bush’s affirmation that the conflict with the Islamic extremists responsible for the September 11th attacks is a “war” against people that implement terrorism to satisfy their objectives).

disrupt the movement of terrorists and terrorist-related materials.¹⁶¹ This section explores the open source and anecdotal reports in the press of these modern MIOs designed to intercept either terrorists or weapons at sea.

A. LEADERSHIP INTERDICTION OPERATIONS IN AFGHANISTAN

On September 12, 2001, the U.N. Security Council condemned the attacks of 9/11 against New York, Washington, D.C., and Pennsylvania, as a “threat to international peace and security.”¹⁶² At the same time, the U.N. Security Council recognized “the inherent right of individual or collective self-defence in accordance with the Charter.”¹⁶³ In early November, 2001, the United States engaged in armed conflict against Afghanistan, which had harbored Usama Bin Laden, Al-Qaeda, the Taliban, and their affiliates, in Operations Enduring Freedom (“OEF”). The U.N. Security Council endorsed this action, and further condemned “the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaeda network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaeda and others associated with them.”¹⁶⁴ In UNSCR 1386, adopted December 20, 2001, the U.N. Security Council established the International Security Assistance Force (“ISAF”) to help maintain security in Afghanistan¹⁶⁵ at a time when U.S. military forces were taking strong and decisive action against Al-Qaeda, the Taliban, and their affiliates.

During OEF, Leadership Interdiction Operations (“LIOs”) were conducted by coalition forces to cut off the escape of Al-Qaeda members fleeing Afghanistan.¹⁶⁶ LIOs continued under Operation

161. See *Pakistan Contributes to Coalition Maritime Campaign Plan*, STATES NEWS SERVICE, Nov. 29, 2004, at 1 (discussing the critical role of Pakistani Navy ships in implementing MIOs in the region). Pakistani Navy ships also provide regional expertise to other state’s ships patrolling the region. *Id.*

162. S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

163. *Id.*

164. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

165. See S.C. Res. 1386, ¶ 1, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (giving the ISAF authority for a period of six months to work with the Afghan Interim Authority to maintain security near the Kabul region).

166. See G. K. Herring, *The War in Afghanistan: A Strategic Analysis*, in NATIONAL SECURITY CHALLENGES FOR THE 21ST CENTURY 161, 170 (Williamson Murray ed., 2003) (noting that leadership interdiction operations in the North

Iraqi Freedom to again stop terrorists from escaping.¹⁶⁷ Coalition forces, including Canada, Poland, France, and other states, participated in these LIOs.¹⁶⁸ LIOs, while a subspecies of MIOs, pose additional challenges because of the small vessels, such as dhows, upon which a fleeing terrorist could potentially hide.¹⁶⁹ This increases the number of vessels that must be contacted and potentially searched.

B. ISRAELI NAVY KARINE-A INCIDENT

The Karine-A incident is an example of a successful modern MIO carried out by a country other than the United States. On January 3, 2002, Israeli Defense Force commandos intercepted and seized a Palestinian-owned ship in international waters, known as the Karine-A, which was smuggling weapons from Iran to the Gaza shore by the Red Sea.¹⁷⁰ Tonga was later reported on Lloyd's List, which tracks worldwide shipping records, to be the flag state of this vessel, but the vessel was owned by a Yemen-based Iraqi.¹⁷¹ Israel claimed that the

Arabian Sea specifically targeted Al-Qaeda members attempting to escape to Somalia and Yemen).

167. See *'This Was a Different Kind of War': Interview with Vice Admiral Timothy J. Keating, U.S. Navy*, PROCEEDINGS, June 2003 (pointing out that during Operation Iraqi Freedom, several states continued their Enduring Freedom Operation efforts through the use of LIOs in the North Arabian Sea, Gulf of Oman, and the Red Sea to catch terrorists).

168. See U.S. DEP'T OF DEFENSE, OFFICE OF PUBLIC AFFAIRS, INTERNATIONAL CONTRIBUTIONS TO THE WAR AGAINST TERRORISM FACT SHEET (June 14, 2002), <http://www.state.gov/coalition/cr/fs/12753.htm> (listing international contributions to the war on terror, including LIOs carried out by Canadian Naval Forces and Polish Special Operations Forces); EMBASSY OF FRANCE IN THE U.S., FRENCH MILITARY CONTRIBUTIONS TO THE FIGHT AGAINST TERRORISM (May 17, 2002), <http://www.ambafrance-us.org/news/statmnts/2002/sfia/fight1.asp> (describing the French contribution to Operation Enduring Freedom, which included French warships conducting LIOs in the Arabian Sea).

169. See *Leadership Interdiction Operations*, CNA QUARTERLY, June 2002, at 2, available at <https://www.usco1.hq.navy.mil/can/images/02jun.pdf> (explaining that contrary to the less significant problem dhows pose in MIOs, which are primarily used to interdict vessels smuggling oil or weapons or engaging in piracy or slave trade, dhows increase sea traffic and can be used to hide one or few escaping terrorists).

170. See David Ivry, *Arafat's Credibility Washed Up*, WASH. TIMES, Jan. 23, 2002, at A15 (noting that the weaponry found aboard Karen A included 2.2 tons of high-grade explosives).

171. See David Osler, *Tonga Freezes Register After Karine A Backlash*,

Karine-A was carrying fifty tons of weapons with Arafat's personal knowledge.¹⁷² According to then U.S. Secretary of State Colin Powell, it was "a pretty big smoking gun," and "clear from all the information available to [the United States] that the Palestinian Authority was involved."¹⁷³ The weapons cache reportedly included Katyusha rockets, anti-tank missiles, land mines, mortar shells, sniper rifles, and high-grade explosives,¹⁷⁴ and were packed in waterproof plastic and attached to buoys which would allow them to be dropped off or retrieved at sea.¹⁷⁵

Some refute the claims that Arafat knew about the weapons on the Karine-A, and have argued that it was more likely that Israel wanted to convince authorities in the United States that the Palestinian Authority and Iran are also enemies in the War on Terror.¹⁷⁶ Arafat stated that the Israeli's had "made-up" the story, and that this

LLOYD'S LIST, Jan. 15, 2002, at 1 (reporting that the Tongan government released a statement expressing its shock over the Karen A incident and its intentions to launch an investigation into the incident). Following the Karen A incident, new registrations for Tongan ships were temporarily suspended. *Id.*

172. See Chris Talbot, *Israel Steps Up Assault on Palestinian Authority*, WORLD SOCIALIST WEB SITE, Jan. 22, 2002, http://www.wsws.org/articles/2002/jan2002/isr-j22_prn.shtml (reporting on Ariel Sharon's belief that Arafat coordinated the Karen A shipment to gain military advantage over Israel during the ceasefire in effect at the time of the incident); Kenneth Jacobson, *ADL Analysis: Arafat Knew About Weapons Shipment*, ANTI-DEFAMATION LEAGUE WEBSITE, http://www.adl.org/israel/karine_a.asp (last visited Mar. 14, 2007) (suggesting that the highly coordinated and well-financed nature of the arms shipment confirms Arafat's involvement in the Karen A incident and exposes the "true face of Palestinian terror").

173. Interview by Jim Lehrer with U.S. Secretary of State Colin Powell, in Washington, D.C. (Jan. 25, 2002), available at http://www.usembassy.it/file2002_01/alia/a2012809.htm. Although Secretary Powell believed that Palestinian leadership was involved in the incident, he stated that he could not link the incident directly to Palestinian leader Arafat. *Id.*

174. See Ivry, *supra* note 170, at A15.

175. See Jacobson, *supra* note 172 (explaining that Karen A crewmembers were instructed to package the weapons in watertight containers to enable boat couriers to retrieve them from the waters of the Mediterranean Sea).

176. See Talbot, *supra* note 172 (relating that some view the Karen A incident as a set-up by Israel undertaken to have a justification for increasing its security operations); *The Karine-A Provides Sharon with a Pretext*, MIDEAST MIRROR, Jan. 7, 2002 (reporting that Arab press and commentators dismissed the Karen-A incident as a contrived conflict orchestrated by Israel to spawn anti-terrorism anger against Palestine, Iran, Lebanon, and Syria). Some view the incident also as a way to undermine American peace envoy efforts in that region. *Id.*

operation was too sophisticated for the Palestinian Authority.¹⁷⁷ The Palestinian Authority issued a statement that it did not have knowledge of this arms shipment, and that such an act was not consistent with its policy.¹⁷⁸ However, Omar Akawi, the captain of the ship (a Palestinian naval officer and member of Fatah for twenty-five years), publicly admitted that the Palestinian Authority had directed his mission.¹⁷⁹ This undermines the Palestinian Authority's denial of the incident, as does the fact that such an intricately planned mission could not have been carried out without the knowledge and financial backing of the Palestinian Authority.¹⁸⁰ Akawi, along with three others arrested on the ship, were charged with illegal arms trafficking in an Israeli military court.¹⁸¹ At the same time as the Karine-A Incident was underway, the United States, through its intelligence services, was also tracking the same vessel¹⁸² as part of its broader efforts to protect against the growing threat of international terrorism.

C. WAR ON TERROR MARITIME INTERCEPTION OPERATIONS OTHER THAN AFGHANISTAN

What are the parameters of these modern MIOs? According to the State Department in 2002, a modern MIO mission “involves the boarding and search or inspection of suspect vessels and taking custody of vessels that are carrying out activities in support of terrorist organizations.”¹⁸³ In the Navy's 2007 fiscal year budget request to Congress, the Navy characterizes its role in MIOs as follows:

177. See Jacobson, *supra* note 172 (stating that there is mounting evidence implicating Arafat in the Karen-A incident which undermine Arafat's position that Israel contrived the incident).

178. See Ivry, *supra* note 170, at A15.

179. See *id.* (providing that Akawi's primary contact was Palestine's chief armaments procurer, who also purchased the Karen-A ship).

180. See *id.* (stating that the “director of finances for Arafat's general security forces, and . . . deputy commander of the Palestinian naval police” were significantly involved in the Karen-A incident).

181. See *Israeli Radio Says Retaliation for “Arms Smuggling” to Last Several Days* (BBC radio broadcast Jan. 11, 2002) (indicating that Sharon ordered the PNA to arrest the parties involved in the illegal arms trafficking).

182. See Jacobson, *supra* note 172 (stating that the United States tracked Karine-A from Yemen to Iran, and then to Palestine).

183. Philip T. Reeker, Deputy Spokesman, Daily Press Briefing (June 3, 2002).

Because more than 95% of the world's commerce moves by sea, it is likely that terrorist networks utilize merchant shipping to move cargo and passengers. . . . U.S. naval forces are well trained to carry out the MIO/EMIO mission . . . to deter, delay, and disrupt the movement of terrorists and terrorist-related materials at sea.¹⁸⁴

The term "Expanded Maritime Interception Operations" ("EMIO") is often used to describe these new operations. EMIO, the Global War on Terror's maritime component, applies globally.¹⁸⁵ The Navy only intercepts a ship and sends boarding teams aboard when it has gathered sufficient information to determine the vessel is acting "suspiciously."¹⁸⁶ Generally, if there is a strong Navy presence, in the form of a destroyer with helicopters overhead, most masters will consent to a search.¹⁸⁷ When masters do not consent, there are Navy SEALs on board with the capability of using force.¹⁸⁸

In 2002, the U.S. Navy acknowledged it was providing training to service members for compliant and noncompliant boardings of vessels¹⁸⁹ that could be engaged in terrorist activities. In January, 2002, the USS LA SALLE (AGF 3) assisted in the interception of the Hajji Rahmed, a Syrian-registered merchant vessel, which was boarded and searched pursuant to a MIO designed to uncover terrorists in the high seas.¹⁹⁰ Neither terrorists nor contraband was found on the vessel, and the Syrians protested, alleging that the boarding was an act of piracy.¹⁹¹ As of June 11, 2002, after seven different ship boardings, no contraband had been seized, and no suspected Al-Qaeda members had been arrested; however, intelligence officers believed that they had gained a valuable

184. RHUMB LINES, Oct. 27, 2004, available at <http://www.navyleague.org/councils/rhumblines102704.doc>.

185. See *id.* For the purposes of this article, we will not distinguish between EMIOs and MIOs.

186. See Loeb, *supra* note 2 (reporting that surveillance teams spend weeks collecting information about a vessel's owners, crew, cargo, and ports before officials make the decision to board and search the ship).

187. See *id.*

188. See *id.*

189. See *CNN Live on Location: Interview with Capt. George Gaylo* (CNN television broadcast Dec. 11, 2002).

190. See Loeb, *supra* note 2.

191. See *id.*

appreciation of smuggling and similar criminal enterprises which could support terrorist activities.¹⁹²

On December 15, 2003, however, a U.S. Navy boarding team from the destroyer USS DECATUR (DDG 73) intercepted a 40 foot dhow in the Arabian Gulf using these expanded MIOs designed to deny use of the seas by terrorists and smugglers.¹⁹³ On board the vessel, large quantities of narcotics were seized and three of the twelve crew members were captured as having suspected links to Al-Qaida.¹⁹⁴ In reporting on this incident, RADM Jim Stavridis, Commander of Enterprise Aircraft Carrier Strike Group stated, “[t]his capture is indicative of the need for continuing maritime patrol of the Gulf in order to stop the movement of terrorists, drugs and weapons This is a vital part of winning the global war on terror.”¹⁹⁵

The U.S. Navy has continued to develop its MIOs program and work with coalition partners and other allies to advance joint MIO exercises.¹⁹⁶ As an example, Pakistan Navy ships have been working with the U.S. Navy Fifth Fleet to carry out MIOs in their region starting in April, 2004.¹⁹⁷ Likewise, the USS THE SULLIVANS (DDG 68) began work with Albanian, Croatian, and Macedonian Forces in the Adriatic Sea to conduct exercises in MIOs in October, 2004.¹⁹⁸ During the same month, the USS HOPPER (DDG 70), in

192. *See id.*

193. *See* USS Decatur Captures Possible Al-Qaida, *supra* note 2 (clarifying that the dhow was traveling in a smuggling route known to be used by Al-Qaeda).

194. *See id.* (stating that about two tons of narcotics worth approximately eight to ten million dollars were found on the dhow). The boarding team initially grew suspicious of the dhow because it lacked proper documentation, and an initial investigation revealed a clear connection between Al-Qaida and the drug smuggling operation. *Id.*

195. *Id.*

196. *See* News Release, Headquarters United States Naval Forces Central Command, Navy Ships Return Fire on Suspected Pirates (March 18, 2006), available at <http://www.cusnc.navy.mil/Media/Release%20pages/Releases/043-06.htm>.

197. *See* Pakistan Contributes to Coalition Maritime Campaign Plan, *supra* note 161 (explaining that as a part of the Coalition Maritime Campaign Plan executed by the Commander Task Force 150, the Pakistan Navy Ship Babur conducted operations with the USS The Sullivans and French frigate FS Surcouf in the Gulf of Oman, where terrorism threatens the oil and shipping industries).

198. *See* USS The Sullivans Participates in Adriatic Multilateral Exercise, NAVY NEWSSTAND, Oct. 26, 2004, available at

Masawa, Eritrea, was engaged in a display of Visit, Board, Search, and Seizure gear used for Maritime Interception Operations to Eritrean military personnel.¹⁹⁹ While much of this reporting is anecdotal in the media, there has not been a clear policy statement arguing the case for these modern MIOs in the War on Terror, and laying out the parameters of such a program.

D. PIRATES IN SOMALIA

As the twenty-first century unfolds the world is again confronted with piracy. No longer the romanticized hoop earring-wearing swashbucklers traveling the high seas in masted schooners, today's pirates are often found in dhows trolling off the coast of one of the world's most lawless countries, Somalia.²⁰⁰ The cutlasses of centuries past have been replaced by automatic weapons and rocket propelled grenades ("RPGs"), and recent events have shown that Somali pirates are unafraid to use them.²⁰¹ Though pirate attacks and hijackings off the coast of Somalia are relatively common, there has been a marked increase in the number of incidences over the last eighteen months.²⁰² In March 2006, the situation deteriorated to such a degree that the U.N. Security Council sought the assistance of

http://www.news.navy.mil/search/display.asp?story_id=15621 (recognizing that four nations participated in combined military exercises in an effort to promote interoperability and cooperation among militaries).

199. Lauren A. Kent, *USS Hopper Visits Masawa, Eritrea*, NAVY NEWSSTAND, Oct. 14, 2004, available at http://www.navy.mil/search/display.asp?story_id=15517.

200. See Phillip A. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61, 61 (1999).

201. See John R. Crook, *Contemporary Practice of the United States Relating to International Law: International Oceans, Environment, Health, and Aviation Law: Continuing U.S. Navy Operations Against Indian Ocean Parties*, 100 AM. J. INT'L L. 700, 700 (noting that thirty-five pirate attacks occurred off Somalia's coast in 2005).

202. See Barbara Starr, *U.S. Navy, Suspected Pirates Clash*, CNN, Mar. 18, 2006, <http://www.cnn.com/2006/WORLD/africa/03/18/pirates.somalia/> (reporting three separate pirate attacks near Somalia between November 2005 and March 2006). In November of 2005, pirates attacked a luxury cruise liner with rocket-propelled grenades; in early March of 2006, Somali pirates kidnapped dozens of Yemeni fishermen; and in another March incident, pirates exchanged fire with Navy ships off the coast of Somalia. *Id.*

naval forces operating off of the coast of Somalia to combat the surging number of piratical acts.²⁰³

On March 18, 2006, U.S. Navy ships, conducting maritime security operations in the Indian Ocean, traded gun fire with suspected pirates off the coast of Somalia.²⁰⁴ During what began as a routine boarding, members of the boarding party soon discovered that the crew was armed with RPGs.²⁰⁵ Thereafter, “[t]he suspected pirates then opened fire on the Navy ships.”²⁰⁶ The crews of the two U.S. Navy ships returned fire which ended the encounter. During the course of the exchange, one suspected pirate was killed and twelve suspects were taken into U.S. custody.²⁰⁷ Navy boarding crews seized an RPG and automatic weapons.²⁰⁸ This incident follows another in late January 2006, in which the USS WINSTON CHURCHILL seized ten men suspected of being pirates off the coast of Somalia.²⁰⁹ An investigation revealed that according to sailors from the vessel, which was ultimately turned into the pirate’s platform, pirates had hijacked the USS WINSTON CHURCHILL and then used it to stage pirate attacks on merchant ships.²¹⁰ This particular MIO was related to piracy, consistent with UNCLOS, and conducted pursuant to a UNSCR, and therefore does not assist in building the case for modern MIOs that do not involve piracy or are not carried out pursuant to a UNSCR. It is, however, important to note that modern

203. See Crook, *supra* note 201, at 700–01 (providing the presidential statement on Somalia recognizing increasing pirate attacks).

204. See Starr, *supra* note 202.

205. See *id.* (explaining that pirate attacks and hijackings in the region often target U.N. World Food Program vessels which carry relief supplies to millions in the region affected by draught).

206. Margaret Besheer, *U.S. Navy Ships Return Fire on Suspected Pirates off Somali Coast*, VOICE OF AMERICA, Mar. 18, 2006, <http://www.voanews.com/english/archive/2006-03/2006-03-18-voa32.cfm?CFID=217134> (quoting Commander Jeff Breslau of the Navy’s Fifth Fleet based in Bahrain).

207. See *id.*

208. Crook, *supra* note 201, at 701.

209. See *id.* (reporting that the USS Winston S. Churchill captured sixteen Indian and ten Somali men aboard the dhow).

210. See *U.S. Navy Seizes Pirate Ship off Somalia*, ASSOCIATED PRESS, Jan. 23, 2006, available at <http://www.military.com/NewsContent/0,13319,86072.html> (explaining that the Navy captured the dhow in response to a report that the pirates had fired on the MV Delta Ranger, a Bahamian-flagged bulk carrier).

day pirates may become involved in terrorism as part of an organized crime scheme—at which time the lines may become more blurred.

IV. MODERN DEVELOPMENTS IN INTERNATIONAL LAW REGARDING THE BASIS TO AUTHORIZE BOARDINGS

Historically, there have been a number of treaties the purpose of which is to combat terrorism.²¹¹ Often, the treaties were in direct response to an attack that had just occurred.²¹² Today, there exist a number of international treaties that have helped to clarify the legal landscape with respect to terrorism.²¹³ This section examines recent developments in international law that are specifically related to the increased need to combat terrorism on the high seas. In particular, it examines the SUA and its 2005 Protocol in light of terrorists smuggling dangerous weapons, which is not a new phenomenon. Rather, it is a phenomenon that long preceded the events of 9/11.²¹⁴ Among the most recent and most relevant to MIOs is the SUA, developed in response to the *Achille Lauro* Incident, and the SUA 2005 Protocol, both of which will be described in detail below.

A. MULTILATERAL CONVENTIONS AND PROTOCOLS ON TERRORISM

Currently, there are twelve major multilateral conventions and protocols related to states' responsibilities for combating terrorism.²¹⁵

211. See U.N. Office of Drugs and Crime [UNODC], Overview—Conventions Against Terrorism, http://www.unodc.org/unodc/en/terrorism_convention_overview.html (explaining that the twelve universal conventions and protocols against terrorism were created by the United Nations and its special agencies).

212. See, e.g., Brad J. Kieserman, *Preventing and Defeating Terrorism at Sea: Practical Considerations for Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*, reprinted in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 425, 426–27 (Myron H. Nordquist et al. eds., 2006) (explaining that the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation was developed in response to the *Achille Lauro* Incident).

213. See, e.g., SUA, *supra* note 11; SUA 2005 Protocol, *supra* note 11.

214. See Barry L. Rothberg, Note, *Averting Armageddon: Preventing Nuclear Terrorism in the United States*, 8 DUKE J. COMP. & INT'L L. 79, 79–80 (1997).

215. See UNODC, *supra* note 211 (providing that the twelve treaties were

They are: the Convention on Offences and Certain Other Acts Committed On Board Aircraft (“Tokyo Convention”), 1963;²¹⁶ the Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”), 1970;²¹⁷ the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (“Montreal Convention”), 1971;²¹⁸ the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973;²¹⁹ the International Convention Against the Taking of Hostages (“Hostages Convention”), 1979;²²⁰ the Convention on the Physical Protection of Nuclear Material (“Nuclear Materials Convention”), 1980;²²¹ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988;²²² the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988;²²³ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988;²²⁴ the Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991;²²⁵ the International Convention for the

developed between 1963 and 1999).

216. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

217. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

218. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177.

219. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

220. International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

221. Convention on the Physical Protection of Nuclear Material, Mar. 3 1980, 18 I.L.M. 1419.

222. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, S. TREATY DOC. NO. 100-19, 1589 U.N.T.S. 474.

223. SUA, *supra* note 11.

224. Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221.

225. Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, S. TREATY DOC. NO. 103-8, 2122 U.N.T.S. 359.

Suppression of Terrorist Bombing, 1997;²²⁶ and the International Convention for the Suppression of the Financing of Terrorism, 1999.²²⁷ This article focuses on the SUA and its 2005 Protocol, which are discussed below.

B. THE *ACHILLE LAURO* INCIDENT

More than twenty years ago, the United States confronted a hostage-taking incident at sea carried out by terrorists.²²⁸ On October 7, 1985, members of the Palestine Liberation Front (“PLF”) hijacked the *Achille Lauro*, an Italian-flagged vessel, which was en route from Alexandria to Port Said in Egypt.²²⁹ The PLF members had successfully smuggled grenades, automatic weapons, and explosives on board the vessel with the intention of either using them to attack Israel or to take Israeli citizens hostage.²³⁰ While on board the vessel, the terrorists took hostages, asserting that they would be exchanged when Israel released fifty Palestinians from jails in Israel, and threatened to blow up the ship.²³¹ The following day, the terrorists shot one of the passengers, Leon Klinghoffer, an American citizen who was Jewish, and threw his body overboard.²³² When the ship arrived in Egypt, law enforcement officials assisted in obtaining the release of the hostages, and took the terrorists into custody, but did so without actually arresting them.²³³ The U.S. government was unable to obtain cooperation from Egypt to extradite the terrorists. When the U.S. government learned that Egyptian officials were planning to fly the terrorists into Tunisia, it pressured Tunisia into

226. International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. TREATY DOC. NO. 106-6, 2149 U.N.T.S. 284.

227. International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 229.

228. See Kieserman, *supra* note 212, at 425 (specifying that the hijackers were members of the Palestine Liberation Front, which is a faction of the Palestine Liberation Organization).

229. See *id.* at 425–26 (noting that while the four hijackers originally intended to stay aboard the cruise ship as *passengers*, they changed their plans and seized the ship when the ship’s crew discovered their weapons after leaving Alexandria) (emphasis added).

230. See *id.*

231. See *id.* at 426.

232. See *id.*

233. See *id.*

refusing to allow the plane to land.²³⁴ While the flight carrying the terrorists was airborne, the U.S. Navy intercepted the plane and forced it to land in Sicily.²³⁵ The Italian government took the terrorists, including group leader Mohammed Abbas, into custody for prosecution but Italy failed to detain them.²³⁶ Italy released some of the terrorists on bail, who ended up fleeing the country.²³⁷ Abbas traveled to Yugoslavia, South Yemen, and Iraq, until he was captured in April 2003 in Baghdad by U.S. forces.²³⁸ Following 9/11, with the *Achille Lauro* Incident in mind, many experts in international and maritime law feared a possible maritime incident similar to 9/11 would be carried out on a passenger-bearing vessel, large commercial cargo ship, or oil tanker, possibly in a major channel or strait.²³⁹

In 1986, in response to the *Achille Lauro* Incident, the IMO proposed the creation of a new convention to deal with maritime terrorism, and an *ad hoc* committee was established to prepare a text for the SUA.²⁴⁰

C. PROVISIONS OF THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (SUA) AND ITS 2005 PROTOCOL

The SUA is of paramount significance to modern MIOs. Adopted in 1988 and entered into force in 1992, the main purpose of SUA is to ensure that appropriate action is taken against persons committing unlawful acts against ships.²⁴¹ These acts include the seizure of ships

234. *See id.*

235. *See id.*

236. *See id.* (describing the runway “standoff” between the American and Italian militaries regarding who would take custody of the detainees).

237. *See id.*

238. *See id.* (explaining that Iraq refused extradition of Abbas after he entered the country).

239. *See id.* at 431 (hypothesizing that a ship could be used as a “collision weapon for destroying critical infrastructure,” sunk in a shipping channel to block traffic, or, in the case of fuel tankers, sunk to disrupt fuel markets or cause environmental damage).

240. *See id.* at 426–27.

241. *See* SUA, *supra* note 11, pmb., 1678 U.N.T.S. at 224 (asserting that violent acts against maritime vessels “seriously affect the operation of maritime services” and calling for a unified approach to the prevention of such acts).

by force, and acts of violence against persons on board ships, and the placing of devices on board a ship which are likely to destroy or damage it, if the act endangers or is likely to endanger the safe navigation of the ship.²⁴² Under the terms of SUA, Member States must either extradite or prosecute alleged offenders.²⁴³

In October 2005, a Diplomatic Conference was convened by the IMO in order to revise the SUA Treaties and adopt the amendments to SUA.²⁴⁴ Seventy-four States Parties to the original SUA treaties participated in this conference.²⁴⁵ While two SUA treaties were revised in 2005, the pertinent treaty relevant to this discussion is the Protocol of 2005 to the SUA (“2005 SUA Protocol”).²⁴⁶ A copy of the text adopted by the Conference was prepared on November 1, 2005.²⁴⁷ The 2005 SUA Protocol opened for signature on February 14, 2006 in Arabic, Chinese, English, French, Russian, and Spanish.²⁴⁸ It will enter into force ninety days after the twelfth country signs it without reservation as to ratification, acceptance, or approval (or deposits an instrument to that effect).²⁴⁹

The 2005 SUA Protocol enumerates additional offenses not found in the earlier SUA treaties, and further states that it is an offense within the meaning of the Convention if a person unlawfully and intentionally acts:

242. *See id.* art. 3, 1678 U.N.T.S. at 224–25 (applying the convention’s substantive prohibitions to anyone who “attempts” or “threatens” to commit any prohibited act, as well as those who “abets” the commission of any prohibited act).

243. *See id.* art. 10, 1678 U.N.T.S. at 226–27 (requiring parties to take alleged offenders into custody, and “submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”).

244. *See* Final Act of the International Conference on the Revision of the SUA Treaties, IMO Doc. LEG/CONF. 15/23 (Oct. 19, 2005).

245. *See id.*

246. SUA 2005 Protocol, *supra* note 11.

247. *See id.*

248. *See id.* arts 17, 24.

249. *See id.* art. 18; *see also* U.S. DEP’T OF STATE, PROTOCOLS TO THE UNITED NATIONS CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION FACT SHEET ¶ 14 (2005) *available at* <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=October&x=20051027150304sjhtrop0.5999109&t=xarchives/xarchitem.html> (detailing the new amendments and provisions added at the international conference).

- (a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act[, and]:
 - (i) uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
 - (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance . . . in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
 - (iii) uses a ship in a manner that causes death or serious injury or damage; or

- (b) transports on board a ship:
 - (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, . . . death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
 - (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or
 - (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

- (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.²⁵⁰

Additionally, a person violates the 2005 SUA Protocol by “unlawfully and intentionally transport[ing] another person on board a ship knowing that the person” has violated SUA with the purpose of protecting that individual from criminal prosecution.²⁵¹ As such, harboring an individual who has used weapons against a vessel or transported prohibited material is also violative of the 2005 Protocol, and could create liability for a ship master who knows that such an individual is on board his or her vessel.

Section (b) (iii), which considers the use of “a ship in a manner that causes death or serious injury or damage” an offense, is the provision which would cover use of a ship as a missile or otherwise similar to the use of airplanes on 9/11.²⁵² The 2005 SUA Protocol does not, however, include an independent mechanism of enforcement.²⁵³ States which are party to the 2005 SUA Protocol are required to ensure that they possess an adequate legal framework (including criminal penalties, and the ability to exercise appropriate jurisdiction) to hold an individual liable, either criminally, civilly, or administratively, for committing an act in violation of SUA.²⁵⁴

D. RESPONSIBILITIES AND AUTHORITIES OF THE SHIP MASTER AND THE FLAG STATE UNDER SUA AND ITS 2005 PROTOCOL

SUA details the responsibilities and roles of the master of the ship, the flag state, and the receiving state to facilitate the delivery of any person believed to have committed an offense under the Convention, and to furnish evidence pertaining to the alleged offense to the appropriate state party.²⁵⁵ A ship’s master has the authority to turn

250. SUA 2005 Protocol, *supra* note 11, art. 4.

251. *Id.*

252. *Id.*

253. See Kieserman, *supra* note 212, at 439–40 (suggesting that the IMO provide each member state with the authority to board, and authorize other states to board, vessels suspected of violating the agreement within their territory).

254. See SUA 2005 Protocol, *supra* note 11.

255. See SUA, *supra* note 11, art. 8.

over to a state party any individual whom the ship's master has reasonable grounds to believe has committed an act in violation of the 2005 SUA Protocol.²⁵⁶ This broad authority could reasonably be interpreted to permit the ship's master to consent to a boarding of his vessel for the purpose of turning over an individual reasonably believed to have violated the 2005 SUA Protocol to a state party. Thus this would be consistent with the more generalized consent of a master to protect the safety and security of his vessel found in the ISPS and ISM.

The 2005 SUA Protocol also adds a section authorizing MIOs.²⁵⁷ Specifically, the 2005 SUA Protocol enumerates procedures applicable to states parties that desire to board a ship flying the flag of another state party where the requesting party has reasonable grounds to suspect that the ship or a person on board the ship is committing, has committed, or is about to commit an offense under SUA.²⁵⁸ Prior to a boarding, the authorization and cooperation of the flag state is required.²⁵⁹ The requesting party shall not board the ship or take measures without express authorization of the flag state.²⁶⁰ Upon request, the flag state shall either authorize the requesting party to board, decline the request to board, or conduct the boarding and search either itself or in concert with the requesting party.²⁶¹ However, if the flag state does not respond within four hours, the requesting party may still have the justification to board the vessel.

Following the accession to the 2005 SUA Protocol, any state party may notify the IMO Secretary-General that it would permit a particular requesting state party to board and search a ship flying its flag, including cargo and persons on board, to determine if an act prohibited by the 2005 SUA Protocol has occurred.²⁶² A state party can also notify the IMO Secretary-General that it authorizes a requesting party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an

256. See SUA 2005 Protocol, *supra* note 11, arts. 8, 8*bis*.

257. See *id.*

258. See *id.*

259. See *id.*

260. See *id.*

261. See *id.*

262. See *id.*; see also SUA, *supra* note 11, art. 8 (authorizing a ship's master to turn over suspected violators to any other state party).

offense has been, or is about to be, committed.²⁶³ Although this provides for IMO authorization where a state party does not hear back from the flag state in a timely manner, the SUA is clearly premised on support for the principle that a flag state must consent to boardings for MIOs.

In carrying out MIOs consistent with the 2005 SUA Protocol, the use of force is to be avoided except when necessary to ensure the safety of officials or persons on board, or where the officials are obstructed from executing authorized actions.²⁶⁴ Safeguards are included when a state party takes measures against a ship, including boarding.²⁶⁵ Specifically, a state party: may not endanger the safety of life at sea; must ensure that all persons on board are treated in a manner which preserves human dignity and is in keeping with human rights law; must take due account of safety and security of the ship and its cargo; must ensure that measures that are taken are environmentally sound; and must take reasonable efforts to avoid unduly detaining or delaying a vessel.²⁶⁶ In the event that damage or other loss occurs in the execution of a boarding under the 2005 SUA Protocol, states parties are liable when the grounds for the boarding are unfounded or when the measures taken are excessive.²⁶⁷ The 2005 SUA Protocol authorizes law enforcement or other officials from warships or military aircraft to carry out such boardings.²⁶⁸

V. U.N. AUTHORITIES FOR MARITIME INTERCEPTION OPERATIONS

Based on the historical precedents for MIOs, it is clear that with an appropriate UNSCR MIOs can lawfully be used to deter threats to peace and security.²⁶⁹ What if, however, there is not a clear UNSCR taken in a particular case, or against a particular country, such as past

263. See SUA 2005 Protocol, *supra* note 11, arts. 8, 8*bis*.

264. See *id.*

265. See *id.* (requiring states to comply with applicable international law when boarding a ship under this convention).

266. See *id.*

267. See *id.*

268. See *id.*

269. See discussion *infra* Part II (discussing the historical precedents for MIOs by focusing on the U.N. Security Council and Rhodesia, Iraq, the Former Yugoslavia, and Haiti).

UNSCRs related to Iraq, Haiti, and the Former Yugoslavia? Are there other authorities under the U.N. Charter that provide a basis for MIOs? This section first explores authority under Article 51 of the U.N. Charter. This section then examines the panoply of UNSCRs related to the issue of combating terrorism generally in the years following 9/11 to determine what authority, if any, can be derived from these UNSCRs to justify MIOs more generally, thus obviating the need for specific UNSCRs on a case-by-case basis as done in the past.

A. SELF-DEFENSE UNDER U.N. CHARTER, ARTICLE 51

Article 51 of the U.N. Charter explicitly affirms a state's inherent right of self-defense, it states:

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.²⁷⁰

This cardinal principle and authority under international law provides the basis for MIOs in the event that the U.N. Security Council has not taken the measures necessary to maintain international peace and security. U.S. doctrine on self-defense requires necessity (in response to a hostile act or hostile intent) and proportionality.²⁷¹ Accordingly, a nation that is responding to an armed attack—such as the United States in response to 9/11—could determine that boarding a vessel at sea that is suspected of harboring terrorists or weapons is properly considered an act of self-defense.

270. U.N. Charter art. 51.

271. See, e.g., COMMANDER'S NAVAL HANDBOOK, *supra* note 27, at § 4.3.2 (outlining the "U.S. doctrine on self-defense, set forth in the JCS Standing Rules of Engagement for the U.S. Forces, that the use of force in self-defense against armed attack, or the threat of imminent armed attack, rests upon" necessity and proportionality).

Arguably, the same rule should apply in the case of maritime interdiction of terrorists or WMD on the basis of anticipatory self-defense.²⁷² This is to say, if a harbored terrorist was planning an imminent attack, or if the weapons were being ferried for the purpose of carrying out an imminent attack, then under a theory of anticipatory self-defense it would not be necessary to wait until such attack occurs to act in self-defense under Article 51—such actions could be taken to prevent an imminent attack. Boarding such a vessel, mounting an inspection, and obtaining biometric data from its crew or passengers, even without the shipmaster's consent, could be viewed as proportional to a great enough threat.

International law allows belligerent warships during an armed conflict to search and visit foreign-flagged merchant vessels to determine whether the merchant vessel is neutral or enemy, the nature of the cargo of the vessel, and other facts bearing on the vessels relation to the armed conflict.²⁷³ There are limitations, however. For example, this right of search and visit exists outside of neutral waters only, and does not authorize search and visits of warships.²⁷⁴ Furthermore, it is well-established in international law that a state engaged in an armed conflict may, on self-defense grounds, stop and search a foreign-flagged vessel where it is reasonably suspected of carrying weapons to another party to the conflict.²⁷⁵ During the Algerian War of Independence (1954–1962), “France stopped and searched several thousand foreign vessels on the high seas for weapons destined for rebel forces, claiming the right of self-defence.”²⁷⁶ Additionally, during the Iran-Iraq War, Iran

272. The authors recognize that many nations are uncomfortable with the notion of anticipatory self-defense or preemptive war.

273. See COMMANDER'S NAVAL HANDBOOK, *supra* note 27, at § 7.6.1 (describing U.S. Naval visit and search procedures); INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 31-2 (Louise Doswald-Beck ed., Cambridge University Press 1995).

274. See COMMANDER'S NAVAL HANDBOOK, *supra* note 27, at § 7.6 (specifying that “[w]arships are not subject to visit and search”); INTERNATIONAL PEACE CONFERENCE, THE HAGUE CONVENTION (XIII) OF 1907 CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR art. 2 (The Endowment 1915).

275. See HARRIS, *supra* note 28, at 928–29 (illustrating the long-established right to stop and search a vessel using the Iranian search of the *Barber Perseus* and the *Cuban Quarantine*).

276. *Id.* at 929.

stopped and searched a British merchant vessel, the *Barber Perseus*, claiming that the vessel was carrying arms for Iraq.²⁷⁷ The British responded:

The [United Kingdom] upholds the general principle of freedom of navigation of the high seas. However, under Article 51 of the UN Charter, a State such as Iran, actively engaged in an armed conflict, is entitled to exercise its inherent right of self-defence to stop and search a foreign merchant ship on the high seas if there are reasonable grounds for suspecting that the ship is taking arms to the other side for use in the conflict. This is an exceptional right: if the suspicions prove to be unfounded and if the ship has not committed acts calculated to give rise to suspicion, then the ship's owners have a good claim for compensation for loss caused by the delay.²⁷⁸

Prior examples of the United States using the inherent right of self-defense for boarding foreign-flagged vessels are the 1962 Cuban Missile Crisis and the 1990 pre-UNSCR embargo against Iraq (for two weeks by the United States and United Kingdom as collective self-defense with Kuwait).²⁷⁹

Therefore, post-9/11, the inherent right of self-defense, articulated in Article 51 of the U.N. Charter, could be used to justify MIOs. On September 12, 2001, the U.N. Security Council, in Resolution 1368, condemned the 9/11 terrorism attacks in New York, Washington, D.C., and Pennsylvania, and characterized them as a “threat to international peace and security.”²⁸⁰ The UNSCR also recognized “the inherent right of individual or collective-self-defence in

277. See D.R. Humphrey, *Belligerent Interdiction of Neutral Shipping in International Armed Conflict*, 2 J. ARMED CONFLICT L. 23, 32 (1997) (reporting that Iran intended to detain and confiscate the cargo of “any ship suspected of transporting goods destined for Iraq”).

278. 90 HANSARD, House of Commons, col. 428, Jan. 28, 1986, *quoted in* HARRIS, *supra* note 28, at 929.

279. See Statement of Rear Admiral William L. Schachte, U.S. Navy (Retired) *Testimony Before the S. Comm. on Armed Services Regarding the Military Implications of the United Nations Convention on the Law of the Sea*, 108th Cong. (Apr. 8, 2004), available at <http://armed-services.senate.gov/statemnt/2004/April/Schachte.pdf>.

280. S.C. Res. 1368, *supra* note 162, ¶ 1.

accordance with the Charter.”²⁸¹ As a result, the United States exercised its authority under Article 51 of the U.N. Charter and responded to the 9/11 armed attack.²⁸² In fact, the U.S. Representative to the United Nations, John D. Negroponte, specifically reported in a letter to the U.N. Security Council that:

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.²⁸³

Accordingly, under this analysis, LIOs, as described above, would be legitimate as an exercise of the inherent right of self defense as part of this armed conflict.

Outside of the fleeing Al-Qaeda and Taliban members from Afghanistan leading to the LIOs, what authority continues to exist more broadly in the ongoing war on terror to conduct MIOs? According to John B. Bellinger, III, State Department Legal Advisor, “[o]n a legal level, the United States believes that it has been and continues to be engaged in an armed conflict with al Qaeda, its affiliates and supporters. The United States does not consider itself to be in a state of international armed conflict with every terrorist group around the world.”²⁸⁴ Accordingly, the United States may be able to legally justify other nonconsensual boardings (outside of LIOs), and

281. *Id.*

282. See Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001), available at <http://www.usunnewyork.usmission.gov/s-2001-946.htm>; see also U.N. Charter art. 51 (granting Member States the right of self-defense until “the Security Council has taken measures necessary to maintain international peace and security”).

283. Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, *supra* note 290.

284. *Oral Statements by the United States Delegation to the Committee Against Torture* (May 8, 2006), available at www.state.gov/documents/organization/66174.pdf (statement of John Bellinger III, Legal Advisor, U.S. Dep’t of State).

the obtaining of biometric data with or without the shipmaster's consent, pursuant to this inherent right of self-defense as part of the ongoing conflict with Al-Qaeda and its affiliates and supporters.

However, since the United States has limited the legal terms of its ongoing armed conflict to Al-Qaeda and its affiliates and supporters,²⁸⁵ Article 51 of the U.N. Charter, which would permit MIOs in furtherance of this conflict, would likely be limited to MIOs designed to interdict Al-Qaeda and their affiliates and supporters, or to the groups supplying weapons to these organizations (relying on the Barber Perses and Algerian War of Independence examples above). These authorities may not permit the United States to board vessels that may be harboring members of other international terrorist groups not in this category, including groups such as Hamas, Palestine Liberation Organizations, Liberation Movement of the Tamil Tigers of Elam, Hezbollah, etc., unless such groups are considered to be supporting Al-Qaeda as their "affiliates" or "supporters." However, even in this context, a nonconsensual boarding can create diplomatic hurdles with key allies whose good will and cooperation are essential to winning the War on Terror.

While the United States may be able to exercise its U.N. Charter Article 51 self-defense authority in the war on terror because of the 9/11 attacks, many nations around the world have fortunately not yet suffered an armed attack by Al-Qaeda and its affiliates, and therefore cannot use a similar self-defense argument to conduct MIOs. Their inability to do so hinders the global effort at interdicting terrorists and their weapons on the high seas. For example, Spain, the United Kingdom, and Indonesia may be able to invoke Article 51 self-defense authority given the major terrorist attacks carried out in their territories and against their people by Al-Qaeda and its affiliates. In contrast, a state such as Costa Rica, which has not suffered a specific attack, may not have that argument unless it considers that it is acting

285. See *id.*; see also Geoffrey Robertson, *Time for Judgment: War on Trial: The American Case for Self-Defence*, THE ADVERTISER, Dec. 22, 2001, at 29 (arguing that the U.S. transition from a "defensive counter-attack against al-Qaeda to an all-out offensive to obliterate the government" exceeded the scope of Article 51 rights); Anthony Clark Arend, *Making the Case for an Attack on Iraq*, THE RECORD, Apr. 18, 2002, at I11 (positing that the U.S. claim of self-defense in attacking Iraq could only be justified if there was sufficient evidence that Iraq provided support to al-Qaeda).

more broadly in the collective self-defense of the United States or other nations in response to 9/11 or other terrorist attacks pursuant to Article 51 of the U.N. Charter. Accordingly, while Article 51 appears to provide legitimate authority for a nation to exercise its inherent right to self-defense, or collective self-defense of another U.N. Member State, the legality of a particular MIO would have to be determined based on this analysis.

B. U.N. SECURITY COUNCIL RESOLUTIONS ON COMBATING TERRORISM POST 9/11

Article 39 of the U.N. Charter reads: “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”²⁸⁶ Following the adoption of UNSCR 1368, which unequivocally condemned the 9/11 terrorism attacks, and characterized them as a “threat to international peace and security,”²⁸⁷ the U.N. Security Council adopted Resolution 1373 on September 28, 2001.²⁸⁸ UNSCR 1373 reaffirmed the principle that acts of “international terrorism[] constitute a threat to international peace and security” and called on “[s]tates to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism.”²⁸⁹

It specifically laid out Chapter VII U.N. authority for states to prevent, suppress, and criminalize the funding of terrorist acts, and to freeze without delay funds or other economic resources of individuals engaged in terrorist acts.²⁹⁰ It also called on states to refrain from providing any financial support to entities or persons committing terrorist acts, to deny them safe haven, and specifically called on them to “[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of

286. U.N. Charter art. 39.

287. S.C. Res. 1368, *supra* note 162, ¶1.

288. See S.C. Res. 1373, *pmb.*, U.N. Doc. S/RES/1373 (Sep. 28, 2001).

289. *Id.*

290. See *id.* ¶ 1.

identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”²⁹¹ While MIOs were not listed as measures authorized in the UNSCR, this did signal a recognition by U.N. Member States that terrorist movement is a threat to international peace and security and that it requires state action.

On December 20, 2001, in UNSCR 1386, the U.N. Security Council “determin[ed] that the situation in Afghanistan still constitute[d] a threat to international peace and security,”²⁹² and under Chapter VII of the U.N. Charter, authorized the establishment of an International Security Assistance Force (ISAF) to support the Afghan Interim Authority in maintaining security.²⁹³ The U.N. Security Council again, in UNSCR 1526, adopted January 30, 2004, highlighted the importance of full implementation of UNSCR 1373, “including with regard to any member of the Taliban and the Al-Qaida organization,” and associated groups that have “participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts.”²⁹⁴ Acting under Chapter VII, the U.N. Security Council called on Member States to “[p]revent the entry into or the transit through their territories of these individuals” and to “[p]revent the direct or indirect supply, sale or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or *using their flag vessels or aircraft*, of arms and related materiel of all types. . . .”²⁹⁵

While neither of these provisions explicitly calls on U.N. Member States to board vessels in order to prevent individuals from entering their territory, or from weapons being transferred to these individuals on flag vessels, it does call on Member States to take action. An argument could be made that under this authority a Member State would be carrying out this Chapter VII mandate if it were to board a vessel to prevent Taliban or Al-Qaeda personnel or associated groups from traveling to such location that it could enter their territory. This is independent of other Article 51 self-defense authorities that may otherwise exist in accordance with the previous section. Likewise, a

291. *Id.* ¶ 2 (g) (emphasis added).

292. S.C. Res. 1386, *supra* note 165.

293. *See id.* ¶ 1; *see also* U.N. Charter ch. VII.

294. S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004).

295. *Id.* ¶ 1 (emphasis added).

similar argument could be made with respect to boarding a vessel to prevent the transfer of illegal weapons to these individuals. It is, however, unlikely that such boardings would be welcomed.

While not directly addressing MIOs, UNSCR 1540, adopted April 28, 2004, calls upon all states “[t]o promote the universal adoption and full implementation, and, where necessary, strengthen[] . . . multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.”²⁹⁶ UNSCR 1540 further calls on states “to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, [and] their means of delivery,” consistent with their domestic and international legal obligations.²⁹⁷ This language further demonstrates the need to control the transit of WMD, but does not provide any new legal authorities.

UNSCR 1617, adopted July 29, 2005, also provides language that may support MIOs. The U.N. Security Council, acting under Chapter VII, called on states to “[p]revent the entry into or the transit through their territories” of Al-Qaeda, and Taliban, and associated groups, and to “[p]revent the direct or indirect supply, sale or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, *or using their flag vessels* or aircraft, of arms and related materiel.”²⁹⁸ However, this obligation, read narrowly, only applies to those states whose nationals or others attempting to conduct such sales or transfers from “their territories or by their nationals outside their territories” or “using their flag vessels”—this does not appear to provide any new authority to an outside enforcing state who desires to conduct a MIO.²⁹⁹ It also specifically urged U.N. Member States “to ensure that stolen and lost passports and other travel documents are invalidated as soon as possible.”³⁰⁰

UNSCR 1618, adopted August 4, 2005, which focused exclusively on Iraq, urged U.N. Member States “to prevent the transit of

296. S.C. Res. 1540, ¶ 8(a), U.N. Doc. S/RES/1540 (Apr. 28, 2004).

297. *Id.* ¶ 10.

298. S.C. Res. 1617, ¶ 1(c), U.N. Doc. S/RES/1617 (Jul. 29, 2005) (emphasis added).

299. *Id.*

300. *Id.* ¶ 9.

terrorists to and from Iraq” and “arms for terrorists.”³⁰¹ While not specifically authorizing MIOs to prevent terrorist travel, resolution 1618 does give a right to enforcing states to take action to prevent the transit of terrorists and their weapons, and resolutions 1617 and 1618 together stress the importance of Member State action to prevent the transit of terrorists and their weapons.³⁰²

UNSCR 1624, adopted September 14, 2005, provides further language that supports the use of MIOs. In the resolution, the U.N. Security Council reminded states that they “must cooperate fully in the fight against terrorism . . . *in order to find, deny safe haven and bring to justice . . . [to] any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.*”³⁰³ It furthermore called on Member States to “cooperate, *inter alia, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures.*”³⁰⁴ While this UNSCR was primarily designed to prohibit incitement to commit terrorist acts, it emphasized the U.N. Security Council’s recognition that safe haven for terrorists in any location – whether in a country or at sea – and terrorist travel, contribute to the threat to international peace and security brought about by terrorism.

In the specific contexts of preventing the transfer of WMD and other weapons to and from North Korea and Iran, UNSCRs 1695 and 1696, respectively, were passed in July, 2006.³⁰⁵ While neither resolution prescribed the method by which nations should prevent such transfers of weapons, they required Member States to “exercise vigilance” to prevent transfers of “missile and missile related-items, materials, goods and technology” to and from North Korea,³⁰⁶ and transfer of “items, materials, goods and technology that could

301. S.C. Res. 1618, ¶ 6, U.N. Doc. S/RES/1618 (Aug. 4, 2005).

302. *See id.*; *see also* S.C. Res. 1617, *supra* note 298, ¶¶ 1–2.

303. S.C. Res. 1624, pmb., U.N. Doc. S/RES/1624 (Sep. 14, 2005) (emphasis added).

304. *Id.* ¶ 2 (emphasis added).

305. *See* S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006); S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006).

306. S.C. Res. 1695, *supra* note 305, ¶¶ 3–4.

contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programmes."³⁰⁷ In the exercise of such vigilance, MIOs could play a key role in preventing such transfers, however, no new maritime authority was included in the resolutions.

Taken together, the more than ten UNSCRs adopted since 9/11, which focus exclusively on the issue of combating terrorism, demonstrate the tremendous efforts being taken to find ways to counter the threat to international peace and security arising from terrorism. While none of these UNSCRs specifically includes language authorizing blanket or specific MIOs, they do collectively call on Member States "to combat *by all means* threats to international peace and security caused by terrorist acts,"³⁰⁸ to prevent entry to or transit through their territories, to prevent smuggling of arms, to prevent safe haven of terrorists, and lastly to "exercise vigilance" in preventing transfers of weapons to and from certain states.³⁰⁹ In order to accomplish these myriad goals, MIOs could play a key role in the future, and render this UNSCR regime more effective.

VI. LAW ENFORCEMENT REGIMES AND AUTHORITIES FOR MARITIME INTERCEPTION OPERATIONS

Neither the United States nor any other country has secured universal boarding agreements with other countries,³¹⁰ which would permit boarding in all instances. However, limited scope boarding agreements have been developed in certain areas.³¹¹ Such agreements can provide a country with the authority to board any of a nation's vessels without flag-state or master's consent.

Recognizing the ever-increasing impact that narcotics trafficking and human smuggling have on modern society, the United States and

307. S.C. Res. 1696, *supra* note 305, ¶ 5.

308. See S.C. Res. 1368, *supra* note 162 (emphasis added).

309. S.C. Res. 1695, *supra* note 305, ¶¶ 3–4; S.C. Res. 1696, *supra* note 305, ¶ 5.

310. See Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT'L L.J. 131, 163–64 (2005) (noting that a lack of consensus stems from state reluctance to undermine the commitment to develop multilateral boarding treaties).

311. See discussion *infra* Part VI.

the international community have made great strides over the past few decades in combating these transnational problems.³¹² Advancements in international law and improved boarding agreements with third parties have aided in deterring and disrupting these criminal acts.³¹³ This is due in part to increased flexibility in a nation's capability to board and inspect vessels suspected to be transporting either narcotics or human beings. This section analyzes what authorities can be derived from the U.S. and international responses to illegal narcotics trafficking, human smuggling and trafficking, and through the Proliferation Security Initiative ("PSI"), which was designed to prohibit the transport of WMD and WMD technology.

A. COUNTER-NARCOTICS OPERATIONS REGIME

As referenced above, during operations with joint forces in the Arabian Gulf in December of 2003, the USS DECATUR (DDG 73) intercepted several vessels found to contain a total of two tons of methamphetamine, hashish, and heroin with an estimated value of eight to ten million dollars.³¹⁴ An investigation into the crew revealed links to Al-Qaeda.³¹⁵ Moreover, during 2004 hearings before the House Committee on International Relations, Senior U.S. Agency officials indicated that Afghanistan's opium output has regained historically high levels.³¹⁶ Early intelligence estimates have shown

312. See Becker, *supra* note 310, at 131–33 (describing the development of UNCLOS as an "immediate reaction to prevent the breakdown of law and order on the oceans") (quoting Arvid Pardo, Malta's Ambassador to the United Nations before the U.N. General Assembly) (citation omitted).

313. See Becker, *supra* note 310, at 147–51 (describing the PSI as "perhaps the most robust project among the several new initiatives that have emerged to address" global threats such as criminal acts). The author also lists events occurring within the first eighteen months of PSI, including international agreements. *Id.* at 155–59, tbl. 2.

314. See *Afghanistan Drugs and Terrorism and U.S. Security Policy, 2004: Hearing Before the H. Comm. on International Relations, 108th Cong. 25 (2004)* [hereinafter *Afghanistan Drugs Hearings*] (Statement of Mark S. Kirk, Rep., Illinois); see also *USS Decatur Captures Possible Al-Qaida Associated Drug-Smuggling Dhow in Arabian Gulf*, NAVY NEWSSTAND, Dec. 19, 2003, http://www.news.navy.mil/search/display.asp?story_id=11163 [hereinafter *USS Decatur Captures Possible Drug-Smuggling Dhow*].

315. See *USS Decatur Captures Possible Drug-Smuggling Dhow*, *supra* note 314.

316. *Afghanistan Drugs Hearings*, *supra* note 314, at 42 (Statement of DEA

links—if not the perfect conditions—for Afghanistan's opium profits to directly fund Al-Qaeda, Taliban, and other jihadist organizations.³¹⁷ As such, anti-narcotics trafficking treaties and agreements have a renewed relevance in international law and the global war on terror.³¹⁸

In order to successfully interdict a shipment of illegal narcotics, generally, rapid action must be taken. Although UNCLOS provides for universal jurisdiction on the high seas for certain crimes, counter-narcotics operations are not among the general exceptions that confer jurisdiction.³¹⁹ Article 108 of UNCLOS demands that all states shall cooperate in illicit trafficking of narcotics or psychotropic substances; however, it does not provide express authority for drug-related interdictions.³²⁰ A party that has reasonable grounds to believe a vessel is engaged in the illicit traffic of narcotics, therefore, would be required to request consent from the flag state to board and search the vessel in order to permit a lawful search over the objection of the vessel's master.

In order to facilitate flag-state consent to a vessel's boarding, and recognizing the problems in the inherent right of self-defense argument as applied to a purely criminal activity, the United States has sought bilateral and multilateral agreements with other states.³²¹ The state of the flagged vessel can consent by agreement to the boarding and search of a particular vessel, or to board their vessels generally in order to prevent the trafficking of these illegal substances.³²² The Maritime Drug Law Enforcement Act of 1980,³²³

Adm'r Karen Tandy).

317. *See id.* at 24.

318. *See* Becker, *supra* note 310, at 180 (“[T]he U.S. strategy to combat drug trafficking may offer helpful comparisons to the PSI strategy to combat WMD proliferation, especially in the context of negotiating WMD-related boarding agreements with key flag states”).

319. *See* UNCLOS, *supra* note 16, art. 110, 1833 U.N.T.S. at 438; *see also* Becker, *supra* note 310, at 202–04 (analyzing universal jurisdiction on the high seas under UNCLOS).

320. *See* UNCLOS, *supra* note 16, art. 108, 1833 U.N.T.S. at 437; *see also* Becker, *supra* note 310, at 179 (explaining that UNCLOS does not provide legal authority for boarding ships to interdict narcotics).

321. *See* Becker, *supra* note 310, at 179 (analyzing the U.S. strategy for pursuing flag-state consent to search vessels).

322. *See id.*

323. Maritime Drug Law Enforcement Act, 46 U.S.C. § 1903(a) (2000).

passed by the U.S. Congress, asserts expanded U.S. Criminal jurisdiction over narcotics trafficking by authorizing U.S. forces to exercise jurisdiction on the high seas and far from coastal waters. Moreover, the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (“U.N. Narcotics Convention”) enables a flag state to authorize another state to board and search vessels suspected in the illicit traffic of narcotics.³²⁴ The U.N. Narcotics Convention, in its appendices, specifically lists which narcotics are considered to be illegal.³²⁵

Specifically, Article 17 of the U.N. Narcotics Convention authorizes states parties to consider entering into bilateral or regional agreements or arrangements to carry out, or enhance the effectiveness of, the provisions of this article.³²⁶ The United States has forcefully pursued the agreements contemplated in Article 17, and has successfully negotiated ship boarding agreements for counter-narcotics purposes with several key Central American countries also plagued with illegal narcotics that either transit through, or are destined for, their territorial seas and/or land, including Honduras, Nicaragua, and El Salvador.³²⁷ These agreements are mutually advantageous, as many of these countries do not have resources sufficient to successfully interdict drug smuggling, thus permitting the United States to augment their capabilities with its own vessels, and hopefully increase their capacities for future interdictions through joint and combined counter-narcotics operations. Likewise, the United States, as a major destination country, is advantaged in that it can reduce the supply of

324. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17(3)–(4), Dec. 20, 1988, S. Treaty Doc. No. 101-4, 1582 U.N.T.S. 164 [hereinafter U.N. Narcotics Convention].

325. See *id.* Annex, tbls. I & II; see also Becker, *supra* note 310, at 180 (explaining that similar tables do not exist in reference to PSI).

326. See U.N. Narcotics Convention, *supra* note 324, art. 17(9).

327. See, e.g., Agreement Concerning Cooperation for the Suppression of Illicit Maritime Traffic in Narcotic Drugs and Psychotropic Substances, with Implementing Agreement, U.S.–Honduras, Mar. 29, 2000, 2000 U.S.T. LEXIS 159; Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea and Air, U.S.–Nicaragua, June 1, 2001, 2001 U.S.T. LEXIS 63; Agreement of Cooperation Concerning United States Access to and Use of Facilities at the International Airport of El Salvador for Aerial Counter-narcotics Activities, Mar. 31, 2000, 2000 U.S.T. LEXIS 134.

narcotics arriving at its shores by minimizing the flow of narcotics from South and Central America, and the Caribbean.

Another possible line of analysis derives from the protective principle under general international law and specifically, Article 27 of UNCLOS.³²⁸ In general, the protective principle argues that a state can protect itself against acts which occur outside of its territory, but which threaten the state.³²⁹ UNCLOS Article 27 provides that a state should exercise its criminal jurisdiction onboard a vessel passing through the territorial sea only:

- a. if the consequences of the crime extend to the coastal State;
- b. if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- c. if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.³³⁰

A 1985 U.S. case, *United States v. Gonzalez*,³³¹ examined this subject. In *Gonzalez*, the U.S. Coast Guard seized a Honduran vessel carrying marijuana, with the consent of Honduran authorities, approximately 125 miles off of the coast of Florida.³³² In so doing, the Coast Guard relied on the Marijuana on the High Seas Act of

328. See Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253, 262 (2005) (arguing that the protective principle ought to be expanded from the criminal narcotics arena to the national security context).

329. See *id.*

330. UNCLOS, *supra* note 16, art. 27(1), 1833 U.N.T.S. at 407.

331. *United States v. Gonzalez*, 776 F.2d 931 (11th Cir. 1985) (affirming a trial court's refusal to dismiss a criminal indictment on constitutional due process grounds).

332. See *id.* at 934 (explaining that the U.S. Coast Guard obtained permission from the Honduran Government to search, seize, and prosecute the crew while on board the seized vessel).

1980,³³³ which permitted U.S. officials to authorize searches and seizures outside of customs waters of foreign flagged vessels *when appropriate agreements had been reached with the respective Flag State*.³³⁴ The court also stated, that without such consent, the United States could prosecute foreign nationals or vessels under the protective principle, which allows a nation to assert jurisdiction over an individual who is outside of the country's territory if such person's acts *threaten the nation's security* or could interfere with governmental functions.³³⁵ This line of reasoning would appear to grant much broader authority for countries to board and search vessels than usually contemplated in the law enforcement environment.

In the context of MIOs for the purposes of interdicting terrorists or weapons on the high seas, the international experience of the United States with counter-narcotics operations³³⁶ underscores the valuable role that boarding agreements, whether bilateral or multilateral, can provide. Narcotics interdiction can no longer be pursued solely through the policies and procedures designed to combat the Latin American Cartel paradigm. The War on Terror requires a transformation of existing authority, as well as new initiatives, to adapt to the new emerging narcotics trafficking threat.

Both UNCLOS and the U.N. Narcotics Convention, taken together, provide express authority for countries to enter into boarding agreements for the purpose of preventing a specified criminal activity. Whether a rogue organization's actions of smuggling narcotics, human beings, arms, or WMD can constitute pure criminal activity and/or be considered acts of terrorism (or the support thereof), thus depends on the circumstances.

333. Pub. L. No. 96-350, 94 Stat. 1159 (1980).

334. *See Gonzalez*, 776 F.2d 931.

335. *See id.* at 938-39.

336. *See generally* Joseph E. Kramek, Comment, *Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This the World of the Future?*, 31 U. MIAMI INTER-AM. L. REV. 121 (2000) (comparing the advantages of bilateral and multilateral boarding agreements).

B. HUMAN SMUGGLING OPERATIONS REGIME

Similar to the counter-narcotics regime, tremendous efforts have been taken over the past five plus years to prevent both the trafficking and smuggling of human beings across borders. Approximately 600,000–800,000 persons are trafficked annually across international borders for the primary purposes of commercial sexual exploitation and forced labor.³³⁷ Human smuggling rings have also developed in recent years, which transport illegal immigrants or migrants across borders, with and without their consent, for the purposes of migration, employment, forced labor, and prostitution.³³⁸ Over the past several decades, organized transnational crime networks have developed to profit from this international trafficking and smuggling of human beings across borders.³³⁹

To address these concerns, the international community has sought to enhance laws that prevent this transit of human beings across international borders, whether by land, air, or sea. The 2000 U.N. Convention Against Transnational Organized Crime³⁴⁰ and its Protocol against the Smuggling of Migrants by Land, Sea and Air,³⁴¹ is the primary international instrument addressing this. Specifically, Article 8 enables a flag state to authorize another state to board and search vessels suspected of smuggling migrants.³⁴² This is similar to

337. See U.S. DEPARTMENT OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT (2006), <http://www.state.gov/g/tip/rls/tiprpt/2006/65983>; see also U.S. DEPARTMENT OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, FACTS ABOUT HUMAN TRAFFICKING (2005), <http://www.state.gov/documents/organization/60949.pdf> (detailing U.S. efforts to combat trafficking).

338. See Jacqueline Bhabha, *Trafficking, Smuggling and Human Rights*, MIGRATION INFORMATION SOURCE, March 2005, http://www.migrationinformation.org/issue_mar05.cfm (distinguishing human trafficking, a non-consensual, coercive-based practice by means of threat and force, from human smuggling, a consensual-based transaction “where the transporter and the transportee agree to circumvent immigration control for mutually advantageous reasons”).

339. See *id.*

340. United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. Doc. A/55/25 (Nov. 15, 2000).

341. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000).

342. See *id.* art. 8(2).

the authorities contemplated in the counter-narcotics regime. The fact that flag-state consent is required in both the counter-narcotics and human trafficking and smuggling contexts limits the overall effectiveness of such regimes to accomplish their goals for several reasons.

First, some flag states may have an incentive to ignore narcotics and human smuggling, whether consensual or not, by their own citizens if such activities result in large remittances of money back into their economies. Second, the time required to obtain flag-state consent if a boarding agreement does not exist will negatively impact the ability of a requesting party to successfully interdict the illicit activity. Third, even if the requesting party were able to detain a vessel while awaiting flag-state consent to a search prior to boarding, and desired to do so, there could be humanitarian reasons why this is not possible. In the context of migrant smuggling, for example, interdicted vessels are often overcrowded, lack fresh water, are rife with disease, and have persons requiring immediate medical attention, food, and water,³⁴³ which may not be available while the requesting party waits for flag-state consent. If such an activity was determined to constitute actual slavery as contemplated in UNCLOS,³⁴⁴ then consent would not be required; however, this determination is rarely made. These precedents in the realm of counter-narcotics and human smuggling operations lend support to the notion that new international agreements can be reached to provide additional authority to board vessels engaged in a growing criminal enterprise; however, these precedents do not authorize non-consensual boardings without the consent of the flag state.

C. THE PROLIFERATION SECURITY INITIATIVE (PSI)

The PSI was developed in response to the increase in proliferation of WMD and their delivery systems.³⁴⁵ The PSI builds on previous

343. See JOANNE VAN SELM & BETSY COOPER, THE NEW "BOAT PEOPLE:" ENSURING SAFETY AND DETERMINING STATUS, 8 (2006), available at www.migrationpolicy.org/pubs/Boat_People_Report.pdf (reporting on the conditions as well as issues and policies involved in migration by sea).

344. UNCLOS, *supra* note 16, art. 110(1)(b), 1833 U.N.T.S. at 438 (establishing a warship's right to visit a foreign ship where there is reasonable ground for suspecting that the ship is engaged in the slave trade).

345. See BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, PROLIFERATION

efforts by the international community to prevent the proliferation of WMD, and is consistent with international treaties, the U.N. Security Council Presidential Statement of January of 2002, and recent statements of the G-8 and the European Union recognizing the need for stronger action to prevent proliferation of WMD.³⁴⁶ The January 2002 U.N. Security Council Presidential Statement specifically declared that the proliferation of all WMD constituted a threat to peace and security, and acknowledged the need for Members States to prevent proliferation.³⁴⁷ The G-8 and European Union statements have likewise urged more coherent and concerted efforts to prevent the proliferation of WMD, their delivery systems, and related materials.³⁴⁸

It has been argued that the *SOSAN* Incident played a key role in the decision to launch PSI.³⁴⁹ On December 9, 2002, Spanish forces encountered a vessel in the Arabian Sea that did not reveal its nationality. As it turned out, the vessel was owned by a North Korean company, and while the cargo was listed as cement, it was also carrying fifteen scud missiles.³⁵⁰ This incident highlighted the urgent need to develop a regime for preventing the transit of WMD. In April, 2003, French authorities ordered one of their own vessels to be searched in port and Egypt, and discovered twenty-two metric tons of dual-use aluminum tubes.³⁵¹ It was becoming clear that maritime commerce was contributing to the proliferation of WMD. What is not clear in PSI, however, is whether it was designed to focus primarily on state actors known to facilitate the transport of

SECURITY INITIATIVE, Sept. 15, 2003, <http://www.state.gov/documents/organization/24252.pdf> (profiling the PSI and listing the eleven countries in the PSI core group as: Australia, France, Germany, Italy, Japan, Netherlands, Poland, Portugal, Spain, United Kingdom, and the United States).

346. *See id.*

347. *See id.*

348. *See id.*

349. *See* Ashley J. Roach, *A Proliferation Security Initiative (PSI): Countering Proliferation by Sea*, in RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND CHINA 351 (Myron H. Nordquist et al. eds., 2006) (detailing two developments that occurred in December, 2002, which influenced the development of the PSI, specifically the *SOSAN* Incident and the publication of the U.S. National Strategy to Combat Weapons of Mass Destruction).

350. *See id.*

351. *See* Becker, *supra* note 310, at 154.

WMD, such as North Korea and Iran, non-State actors such as Al-Qaeda,³⁵² or both.

The PSI was officially announced by President Bush on May 31, 2003 in Krakow, Poland, in order to combat the threat of the proliferation of WMD.³⁵³ In launching the initiative, President Bush stated the United States and other allies have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies.³⁵⁴ Initially, eleven states, including the United States, Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom, agreed to participate in the PSI.³⁵⁵ Over the following several months, these states developed a Statement of Interdiction Principles, which was agreed to on September 4, 2003.³⁵⁶

In December of 2003, Canada, Denmark, Norway, and Singapore joined PSI, and in April and May of 2004, both the Czech Republic and Russia joined PSI.³⁵⁷ On May 31, 2004, sixty one nations met in Krakow, Poland, and expressed political support for this initiative.³⁵⁸ Today, more than seventy five states are participants in the PSI.³⁵⁹ Efforts to improve the effectiveness of PSI are ongoing. On September 25–26, 2006, the United States and nineteen other nations met in London to focus on enhancing efforts to halt international trafficking of WMD, their delivery systems and related materials.³⁶⁰

352. See Logan, *supra* note 328, at 256 (stating that, according to the Statement of Interdiction Principles, the PSI aims to prevent proliferation among “states” and “non state actors”); see also Becker, *supra* note 310, at 159 (quoting Under Secretary Bolton, who acknowledged that Iran and North Korea were states of “proliferation concern,” but that PSI efforts are not aimed at halting “worldwide trafficking”).

353. See Remarks to the People of Poland in Krakow, Poland, 39 WEEKLY COMP. PRES. DOC. 700, 702 (May 31, 2005) [hereinafter Krakow Speech] (stating that the PSI is necessary in order to provide the “means and authority” to seize “weapons of mass destruction”).

354. See *id.*

355. See Roach, *supra* note 349, at 352.

356. See *id.*

357. See Logan, *supra* note 328, at 255.

358. See Roach, *supra* note 349, at 352.

359. See Media Note, Office of the Spokesman, U.S. Dep’t of State, London PSI Meeting Advances Public-Private Partnership to Combat WMD Proliferation (Sep. 26, 2006), <http://www.state.gov/r/pa/prs/ps/2006/73177.htm>.

360. See *id.*

To achieve its objectives, the PSI was designed to permit interception of WMD on land and in the air, but has primarily focused to date on interception at sea.³⁶¹ When such weapons are found at sea, PSI participants will attempt to board and search vessels in the high seas and seize the vessel and its cargo if necessary.³⁶² However, the PSI does not specifically establish any boarding authority,³⁶³ and accordingly, does not provide participating states with any new legal authority to conduct interdictions in international waters. Interdictions must be carried out consistent with existing international law.³⁶⁴ Accordingly, as with the previously discussed mechanisms, enforcement of PSI requires an analysis of various authorities on a case by case basis to determine whether a nonconsensual boarding is lawful under the circumstances. Policy statements that accompanied the PSI make it clear that the PSI is an activity and not an organization.³⁶⁵

In order to carry out the purposes of the PSI, recognizing that there is no clear interdiction authority in the initiative and no enforcement mechanism, the United States and its allies have relied on bilateral boarding agreements and partnerships that permit them to search ships carrying suspected cargo and seize illegal weapons and missile technologies.³⁶⁶

361. See Becker, *supra* note 310, at 134.

362. See *id.*

363. See The Proliferation Security Initiative: Statement of Interdiction Principles, The Proliferation Security Initiative, <http://usinfo.state.gov/products/pubs/proliferation/#statement> (last visited Mar. 13, 2007) [hereinafter PSI Interdiction Principles] (asking states to take their own “initiative” to board and search a vessel flying “their flag” in their “internal waters”). The interdiction principles also instruct participating states to “seriously consider providing consent under the appropriate circumstances” for the searching of its own flag vessels by other states. *Id.*

364. See *id.* (encouraging states to support interdiction efforts to the extent to which “national legal authorities permit” consistent with “obligations under international law”).

365. See Chairman’s Conclusions, Proliferation Security Initiative: London 9-10 October, <http://www.fco.gov.uk/Files/kfile/PSIConclusions,0.pdf> (allowing states to participate in the “activity” if they accept certain principles and make an “effective contribution”).

366. See, e.g., Proliferation Security Initiative Ship Boarding Agreement with Cyprus, U.S.–Cyprus, July 25, 2005, Temp. State Dep’t No. 06-33, <http://www.state.gov/t/isn/trty/50274.htm> [hereinafter Ship Boarding U.S.–Cyprus]; Proliferation Security Initiative Ship Boarding Agreement with Liberia, U.S.–Liber., Feb. 11, 2004, <http://www.state.gov/t/isn/trty/32403.htm> [hereinafter

As PSI participants do not undertake any long-term binding responsibilities or obligations by agreeing to participate,³⁶⁷ it became essential to develop guidelines that countries could follow to effectuate the shared goal of PSI. Responding to this need, the Statement of Interdiction Principles was developed in Paris, France, in September 2003.³⁶⁸ The Statement of Interdiction Principles is premised on the concept that flag-state consent is required in order to board, search, or seize its vessels, however, it permits them to select how such consent will be granted.³⁶⁹ The key principle in the Statement of Interdiction Principles is to establish a more coordinated and effective basis through which to impede and stop shipments of WMD, delivery systems, and related materials flowing to and from states and non-state actors of proliferation concern, consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council.³⁷⁰

In order to support the commitments of PSI, the Statement of Interdiction Principles encourages participating states to: (1) undertake effective measures to interdict transport of WMD; (2) adopt streamlined methods of sharing and exchanging information related to proliferation; (3) review and strengthen relevant national legal authorities and relevant international laws; and (4) take specific actions to interdict WMD.³⁷¹ To further facilitate the PSI, cooperation has been sought from any state whose vessels might be used for proliferation purposes by state or non-state actors.³⁷² Several

Ship Boarding U.S.–Liber.]; Proliferation Security Initiative Ship Boarding Agreement with Croatia, U.S.–Croat., June 1, 2005, <http://www.state.gov/t/isn/trty/47086.htm> [hereinafter Ship Boarding U.S.–Croat.]. The agreements contain common terms outlining their object, purpose, and extent of obligations. *See, e.g.*, Ship Boarding U.S.–Cyprus, *supra*, art. 2.

367. *See* Becker, *supra* note 310, at 149 (“[T]he PSI is not a multilateral treaty regime.”).

368. *See id.*

369. *See* Roach, *supra* note 349, at 353 (anticipating consent to board being granted in “advance or on a case-by-case basis”).

370. *See* Becker, *supra* note 310, at 149.

371. *See id.* at 149–150.

372. *See* Robert Joseph, Undersecretary of State for Arms Control and International Security, Speech on the Proliferation Security Initiative (June 23, 2006), in CONGRESSIONAL QUARTERLY, June 23, 2006 (encouraging states to contribute to the PSI as much as their “capabilities” and “laws” allow).

states have signed boarding agreements to permit searches of suspect merchant vessels under their flag.³⁷³

The first noteworthy PSI case involved the *BBC China*, which was a German-owned ship, flagged in Antigua and Barbuda,³⁷⁴ that was carrying thousands of gas centrifuge components that can be used to enrich uranium.³⁷⁵ After becoming suspicious of this shipment in September 2003, American and British intelligence services alerted the German government which diverted the ship to a port in Italy where the materials were seized.³⁷⁶ The cooperation of the German, Italian, American, and British governments was essential to this operation, which has been viewed as a success story for PSI.³⁷⁷ The *BBC China* incident has been credited as a factor in Libya's decision to renounce its desire to obtain nuclear weapons in December 2003, and learning about the A.Q. Khan network's role in black-market nuclear technology.³⁷⁸ While other reported PSI-interdictions have occurred, there are few details publicly available.³⁷⁹

At a PSI meeting in London in October 2003, the United States described its proposal to begin negotiating bilateral ship boarding agreements, similar to its counter-narcotics agreements, that would permit a faster consent for boardings of ships suspected to be carrying WMD, as consistent with the Statement of Interdiction Principles.³⁸⁰ Following this, the United States has sought bilateral boarding agreements to secure access to ships; however, to date, the United States has only secured six bilateral boarding agreements related to PSI including: Belize, Croatia, Cyprus, Liberia, Marshall Islands, and Panama.³⁸¹ These nations (and others like them) are

373. See Logan, *supra* note 328, at 273 (explaining that because the United States has ship boarding agreements with Liberia and Panama, the United States can now "freely board" over "30% of world's cargo vessels"); see also Roach, *supra* note 349, at 354 (noting that United States is engaged in consultations and negotiations with more than "20 additional countries" to sign ship boarding agreements).

374. See Roach, *supra* note 349, at 357.

375. See Becker, *supra* note 310, at 155.

376. See *id.*

377. See *id.* at 155–56.

378. See Roach, *supra* note 349, at 357.

379. See Becker, *supra* note 310, at 156–58.

380. See Roach, *supra* note 349, at 354.

381. See Proliferation Security Initiative Ship Boarding Agreement with Belize, U.S.–Belize, Aug. 4, 2005,

often referred to as “flag of convenience” states due to their relatively lax vessel registration requirements.³⁸² Panama, Liberia, and the Marshall Islands alone constitute more than 30% of the world’s gross tonnage of merchant ships,³⁸³ and accordingly, represent a much more significant accomplishment than is apparent from merely counting the numbers of agreements alone.

However, it is still unclear whether the PSI will prove to be a fruitful way to prevent the proliferation of WMD. Some advocates claim that the PSI has potential, but that it is difficult to determine how effective it has been since many PSI participants have been hesitant to publicly announce when or where interdictions have taken place.³⁸⁴ Others have raised concerns that the increase in dual use WMD materials³⁸⁵ will make this type of regime less effective, as innocuous parts can be transported lawfully, but later used for an improper purpose. What is certain is that if the United States intends to rely on PSI bilateral boarding agreements to prevent the proliferation of PSI, it will need more than six partner countries.

Taken as a whole, this section lends further support to the principle that flag state consent is required for boardings and searches of its vessels and that bilateral boarding agreements are an effective tool in securing consent. The Statement of Interdiction Principles also clearly lays out the notion that streamlined methods of communications and shared information are essential.

http://www.nti.org/e_research/official_docs/dos/dos080405.pdf; Proliferation Security Initiative Ship Boarding Agreement with Marshall Islands, U.S.–Marsh. Is., Aug. 13, 2004, <http://www.state.gov/t/isn/trty/35237.htm>; Proliferation Security Initiative Ship Boarding Agreement with Panama, U.S.–Pan., May 12, 2004, <http://www.state.gov/t/isn/trty/32858.htm>; Ship Boarding U.S.–Cyprus, *supra* note 366; Ship Boarding U.S.–Liber., *supra* note 366; Ship Boarding U.S.–Croat., *supra* note 366.

382. Nuclear Threat Institute, Proliferation Security Initiative, http://www.nti.org/f_wmd411/f1b4_6.html (last visited Mar. 13, 2007).

383. See Roach, *supra* note 349, at 354.

384. See Logan, *supra* note 328, at 274.

385. See *id.* at 259 (quoting Michael Beck, *The Promise and Limits of PSI*, *The Monitor*, Spring 2004, at 16.).

VII. RECOMMENDATIONS FOR DEVELOPING MARITIME INTERCEPTION OPERATIONS INTO MORE EFFECTIVE TOOLS IN THE WAR ON TERROR

In any discussion of developing international law, it is important to remember the key sources of international law. These include: treaties and agreements; customary international law, which is the practice and custom of states over time accepted as legally binding; UNSCRs; authorities derived from the U.N. Charter; and Jus Cogens, which are general principles of law (but of which, not all nations believe are binding). This article has addressed key sources of international law³⁸⁶ that relate to customary laws of the sea and maritime commerce, counter-terrorism and maritime treaties, bilateral ship boarding agreements, and MIOs carried out pursuant to UNSCRs or pursuant to the U.N. Charter. In many instances, the authorities have not been entirely clear. To add clarity, this section first summarizes those authorities that have been identified in this article to carry out modern MIOs in the War on Terror. Next, this section proposes ways that nations may expand the existing authorities for maritime interdictions.

A. ANALYSIS OF EXISTING AUTHORITIES TO CONDUCT MARITIME INTERCEPTION OPERATIONS IN THE WAR ON TERROR

As this article is not intended to be an advocacy piece for or against specific authorities, this section will simply provide the authors' candid, and simplistic, analysis of the state of existing law.

1. *A U.N. Security Council Resolution is Golden*

From the incidents in Rhodesia, Iraq, Haiti, and Former Yugoslavia, it is clear that a UNSCR authorizing MIOs in a particular country is sufficient authority to prevent terrorist travel or the transport of WMD for use by terrorists. More generally, a UNSCR authorizing MIOs under Chapter VII of the U.N. Charter to prevent terrorist travel or the proliferation of WMD would also be sufficient authority. However, at present, no such blanket authority

386. See analysis, *supra* Part VI (detailing U.N. authorities for MIOs).

exists, although there is a growing awareness within the Security Council for the need to do more, given the panoply of post-9/11 counter-terrorism resolutions.³⁸⁷

2. *Self-Defense Under Article 51 of the U.N. Charter Always Trumps*

The Algerian War of Independence from France, the Cuban Missile Crisis, the Iran-Iraq War, and the pre-Iraq war collective self-defense of Kuwait all reinforce the principle that nothing interferes with the inherent right of self-defense of a nation. If a MIO is necessary in the self-defense of a nation, or in the collective self-defense of a nation, either to prevent the transport of contraband to the enemy, or more generally, to restore the peace and security, it would be justified. In the limited context of Afghanistan, reading together UNSCRs 1368³⁸⁸ and 1386³⁸⁹ (establishing the ISAF), it would naturally follow that a MIO conducted by the United States against Al-Qaeda or Taliban leadership arising from that conflict in self-defense under Article 51 of the U.N. Charter would be sufficient justification. In the broader war on terror, necessary actions—including MIOs—to thwart attacks by Al-Qaida and its affiliates or supporters as part of ongoing conflict may also be justified under Article 51 of the U.N. Charter as part of the self-defense of the United States. When available and legitimate, Article 51 trumps existing authorities³⁹⁰ and thus would permit MIOs provided the operation is a legitimate exercise of self-defense.³⁹¹

387. See, e.g., S.C. Res. 1735, pmb., U.N. Doc. S/RES/1735 (Dec. 22, 2006); S.C. Res. 1618, U.N. Doc. S/Res/1618 (Aug. 4, 2005); S.C. Res. 1617, U.N. Doc. S/Res/1617 (July 29, 2005) (“[S]tressing . . . the important role the United Nations plays in leading and coordinating” the effort to eliminate terrorist acts).

388. S.C. Res. 1368, *supra* note 162, pmb., art. 1 (acknowledging the 9/11 attacks as a “threat to international peace and security” and recognizing the “inherent right of individual or collective self-defence in accordance with the charter”).

389. S.C. Res. 1386, *supra* note 165, ¶ 1.

390. See U.N. Charter art. 51, para. 1 (setting forth that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence . . . until the Security Council has taken measures necessary to maintain international peace and security.”).

391. See discussion *supra* Part V.A (outlining the necessity and proportionality requirements of self-defense operations in the maritime context).

3. *When in Doubt, Obtain Flag-State Consent*

It is clear from UNCLOS and, considered customary international law, that a warship can board a foreign-flagged vessel without flag-state consent if there are reasonable grounds to suspect that the ship is engaged in piracy, the slave trade, unauthorized broadcasting, or if the vessel is without nationality, as long as the vessel being boarded is not a warship or other government vessel.³⁹² However, that unqualified blanket authority does not exist to interdict terrorists or WMD on the high seas. A strong argument can be made under the ISPS Code that a master's consent to a search of his vessel, with or without flag-state consent, may be sufficient if it is for the sole purpose of protecting the safety and security of his vessel but not purely for the purpose of appeasing a nation which desires to board to inspect goods or personnel. This is supported under Article 27 of UNCLOS, which also provides that a coastal state must, "if the master so requests," notify a representative of the flag state before taking any steps.³⁹³

However, this conclusion, that there may be authority for the Master to give consent for this limited purpose of protecting the safety and security of his vessel, remains at odds with the time tested principle that a flag state retains the ultimate authority to consent to boardings, searches, and seizures of vessels flying under its flag.³⁹⁴ The principle of flag-state consent has been most recently validated through the 2005 SUA Protocol and Statement of Interdiction Principles in the PSI, which support the fundamental premise of flag-state consent.³⁹⁵ Given that there are some divergent authorities, this is an area where specific acts could be taken to expand authorities under international law if there were to be a broad enough consensus

392. See UNCLOS, *supra* note 16, art. 110, 1833 U.N.T.S. at 438 (laying out the exception for when a foreign ship can be boarded); Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius – Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 676 n.122 (2004) (asserting that UNCLOS Article 110 binds non-party states as it provides rules of customary international law).

393. UNCLOS, *supra* note 16, art. 27, 1833 U.N.T.S. at 407–08.

394. See Becker, *supra* note 310, at 176–77 (emphasizing the primacy of a flag-state's control over its vessels).

395. See SUA 2005 Protocol, *supra* note 11, art. 8; PSI Interdiction Principles, *supra* note 363 (emphasizing the role of consent in searches and seizures).

among countries to do so. At a minimum, some additional decisions may be required to clarify the state of the law even if there is not consensus to go further. If neither the flag state nor the master consents to a boarding or search within their respective authorities, then a separate authority, such as a UNSCR, Article 51 of the U.N. Charter self-defense authority, or a new law will be required for a boarding.

4. *Boarding Agreements Save Time*

Following the regime established for counter-narcotics operations and the PSI, bilateral and multilateral agreements will ensure the most expedient way to guarantee that flag-state consent exists for a boarding, whether the master consents or not. While the existing bilateral agreements for counter-narcotics and PSI authorize boardings for a specific purpose,³⁹⁶ the United States has not secured any “universal boarding agreements” that would permit the U.S. authorities to board a vessel for law enforcement, security, or humanitarian reasons.³⁹⁷ While universal agreements would clearly be the most expedient way, there are tradeoffs in the amount of sovereignty that a flag state is willing to cede, and an erosion of the principle of freedom on the high seas.

5. *There Are No Treaties Exactly on Point*

While this article has attempted to examine the multitude of legal justifications for MIOs, there is no treaty exactly on point authorizing such activity. Instead, we can glean certain principles from the 2005 SUA Protocol, which calls on nations to take action to prevent the proliferation of explosive, radioactive or biological, chemical, or nuclear weapons, may be relied upon.³⁹⁸ However, the 2005 SUA Protocol does not override the longstanding principle of flag-state consent,³⁹⁹ but instead indicates that perhaps the international community is not ready yet to let go of this cardinal

396. See *supra* note 366 (citing exemplary bilateral boarding agreements).

397. See Kramek, *supra* note 336, at 147 (outlining barriers to multilateral boarding agreements).

398. See SUA 2005 Protocol, *supra* note 11 (proscribing various WMD related activities).

399. See *id.* art. 8 (requiring flag-state authorization before certain boarding).

principle. While discouraging at best, it could be argued that most past international counter-terrorism treaties have generally been adopted immediately following a horrific incident calling the world's attention to a particular threat, including, for example, the Hostages Convention of 1979⁴⁰⁰ which followed the taking of hostages in the U.S. Embassy in Tehran, and Terrorist Financing Conventions following 9/11.⁴⁰¹ It would be a shame to wait for another tragedy to clarify the law.

6. *The IMO Has Yet To Solve the Problem*

The IMO has made significant contributions to the development of maritime and international law, and continues to take effective action to address emerging trends on the High Seas. ISPS is a prime example. ISPS indicates that the master has authority to determine access to his or her vessel for the purposes of ship safety and security.⁴⁰² This may assist in a more expedient boarding if a flag state cannot be contacted, or has not responded to a request, and the master's vessel is at risk. This is a positive clarification of the views of Member States of the IMO. The ISPS, and more generally, actions of the IMO, however, do not come with any independent enforcement authority or mechanism to ensure they are applied—it is left up to the governments to implement the actions they legislate.⁴⁰³

B. EXPANDING AUTHORITIES TO CONDUCT MARITIME INTERCEPTION OPERATIONS IN THE WAR ON TERROR

While the international community must continue to improve methods to identify those terrorists who may be using commercial vessels for transit, and to stop shipments of WMD to commercial ports around the world, legal authority to act in a timely manner when this information is available is crucial. This section posits ways to enhance these existing authorities to ensure the greatest possible

400. International Convention Against the Taking of Hostages, Dec. 18, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

401. See Victor C. Romero, *Equal Protection Held Hostage: Ransoming the Constitutionality of the Hostage Taking Act*, 91 NW. U. L. REV. 573, 573 (1997).

402. See Trelawny, *supra* note 51, at Annex 1, Reg. 8.

403. See *id.* at 5 (delegating the responsibility of applying the ISPS Code to Contracting Governments).

opportunity to prevent terrorist travel and the transport of dangerous weapons on the high seas through a robust regime that utilizes MIOs. These possibilities can help to ensure that the world works together as a whole to assist in capturing terrorists and WMD at sea.

1. Seek or Interpret U.N. Security Council Authority to Conduct Maritime Interception Operations to Prevent Terrorism

While authority to conduct MIOs can be granted with express U.N. Security Council endorsement in a resolution, how could the United States go about this? Beginning in 2003, there have been a series of UNSCRs related to the issue of combating terrorism.⁴⁰⁴ In this context, the U.N. Security Council has authorized a number of means to combat terrorism, including: calling on Member States to work together to prevent, suppress, and freeze funds, and to refrain from financially supporting terrorist organizations;⁴⁰⁵ prevent the movement of terrorists or terrorist groups;⁴⁰⁶ prevent transit of terrorists or terrorist groups through their countries, including using their flag vessels or aircraft for transit;⁴⁰⁷ prevent the supply of materials to such groups;⁴⁰⁸ deny terrorists safe haven and bring them to justice;⁴⁰⁹ and to strengthen international borders.⁴¹⁰ A follow-on UNSCR granting express authority for MIOs could be adopted to support the existing resolutions. In the event that such a resolution is not adopted, however, an argument can be made that it is implicit in the existing resolutions. This latter argument will likely face tremendous criticism.

404. See, e.g., S.C. Res. 1526, *supra* note 294; S.C. Res. 1540, *supra* note 296; S.C. Res. 1617, *supra* note 298 (emphasizing the prevention of international terrorism and maintenance of peaceful relations).

405. See S.C. Res. 1373, *supra* note 288, ¶ 1 (requiring that states criminalize certain acts of funding and freeze certain assets).

406. See S.C. Res. 1526, *supra* note 294, ¶ 1(b) (requiring that states prohibit terrorists and terrorist groups from moving from state to state).

407. See *id.*

408. See *id.* at ¶ 1(c) (requiring states to prevent the “direct or indirect supply” of “arms and related materiel of all types”).

409. See S.C. Res. 1373, *supra* note 288, ¶ 2 (requiring that states “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.”).

410. See S.C. Res. 1540, *supra* note 296, ¶ 3(c) (requiring that all states “[d]evelop and maintain appropriate effective border controls and law enforcement efforts”).

2. *Conduct Non-Consensual Boardings and the Taking of Biometrics as Consistent with the U.N. Charter*

The United States, in the exercise of its inherent right to self-defense under the U.N. Charter,⁴¹¹ is justified in conducting MIOs that derive from its conflict with Al-Qaida, the Taliban, and their affiliates and supporters. While this article has pointed out that there is ambiguity in how far this authority goes, such as whether it includes the taking of biometrics, etc., an exercise of limited MIOs against only those vessels suspected of harboring, or supplying weapons to, Al-Qaida, the Taliban and their affiliates and supporters, is justifiable as consistent with the U.N. Charter. Accordingly, efforts to carry out such MIOs may contribute to developing broader principles or customs of international law.

3. *Seek Expanded Authorities Under the International Maritime Organization (IMO)*

The IMO has already taken significant measures to enhance security of ships and port facilities post-9/11,⁴¹² and could take additional steps to legislate nonconsensual boarding of vessels in peacetime to interdict terrorists and WMD. In particular, it could focus on expanding the authority granted to ship masters in ISPS to permit them to consent to any search of their vessels for terrorist purposes. Moreover, the IMO would be well served to focus strongly on improving regimes of communications between flag states, their masters, the vessels, and third countries. Clearly this article has demonstrated the importance of communication between third countries and flag states when they desire to board a vessel, and between flag states and masters of the vessels. Delays in communications can result in misunderstandings between countries and cause diplomatic harm. Additionally, they can result in inability to prevent terrorist travel.⁴¹³

411. U.N. Charter art. 51, para. 1.

412. See Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L.J. 1, 16–18 (2006) (describing the ISPS as the IMO's most aggressive measure after 9/11).

413. See Balkin, *supra* note 412, at 18 (explaining that masters of ports need to be able to communicate among ships to ensure the security of countries and their ports).

4. *Continue to Press for PSI and Other Bilateral Boarding Agreements*

While the United States has only obtained six PSI boarding agreements to date;⁴¹⁴ a greater international understanding of terrorist travel, the means of proliferating WMD, and the need to ensure that ports are safe from detonation of weapons that are being harbored on board vessels may result in a greater number of such agreements in the future. An international regime that focuses more on “universal boarding agreements” would support both security and law enforcement purposes, however, it may be too far-reaching for sovereign states to agree to. At a minimum, the equivalent of the PSI agreements to also cover terrorist travel, not purely the transport of weapons, should be considered.

5. *Seek an International Convention that Authorizes Non-Consensual Boarding of Vessels, and the Taking of Biometrics, when Appropriate Justification Exists*

International agreements can be time-consuming, and are subject to being watered down from their original intent. However, the international community has passed a large number of anti-terrorism treaties, often in the wake of terrorist attacks.⁴¹⁵ A provision on boarding of vessels could be inserted into a new convention focusing on terrorist travel and transport of weapons. While a more comprehensive treaty on international terrorism would be ideal for this, the contemplated Draft U.N. Comprehensive Convention on International Terrorism⁴¹⁶ is likely to be too general in nature to authorize a specific regime of shipboarding. However, all possible treaties should be explored.

414. *See supra* note 366.

415. *See* UNODC, Conventions Against Terrorism, <http://www.un.org/terrorism/instruments.html> (last visited Mar. 13, 2007) (listing thirteen international anti-terrorism treaties).

416. G.A. Draft Res. 60/L.12, U.N. Doc. A/C.6/60/L.12 (Nov. 23, 2005).

6. Conduct Non-Consensual Boardings and the Taking of Biometrics as Consistent with Treaty and Customary Law

No article would be interesting to read without at least one provocative thought for future authors to challenge—the Nike “Just Do It” slogan comes to mind. As described more generally above, customary international law is a key component of international law, and it can develop over time without explicit state consent. Albeit many argue, it cannot develop if there are persistent objections by key states.⁴¹⁷ Here, nations could “Just Do It”. For example, the United States could assist in expanding authorities by interpreting Article 51 of the U.N. Charter more broadly to cover any ship boarding designed to interdict all terrorists (not just Al-Qaeda, the Taliban, and their affiliates or supporters) in the War on Terror by interdicting terrorists or seizing weapons. Similarly, a nation that does not consider itself to be in a state of armed conflict (therefore not relying on UNSCRs or Article 51 self-defense authority) could also begin a regime of interdicting terrorists or WMD based on this developing principle or custom of law.

The United States, or any other nation, could also broadly interpret authorities under the ISPS to engage in boardings with the master’s consent, and to include the taking of biometrics. While developing new customary international law in this manner will likely make many scholars of international law cringe, nations may still argue that they can block such actions from becoming customary international law by persistently objecting. Such a custom, if developed, would certainly assist in the interdiction of terrorists and weapons that are being transported on the high seas, but may come at too high a price for sovereign nations to agree to.

CONCLUSION

As the world becomes increasingly involved in non-traditional armed conflict that is not waged by nation-states, but rather is carried out by non-state actors who are terrorists and do not follow the laws

417. See Holning Lau, Comment, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHI. J. INT'L L. 495, 495 (2005) (positing that, with the exceptions of peremptory norms, “if a state persistently objects to the development of a customary international law, it cannot be held to that law when the custom ripens.”).

of war, traditional international laws may not be sufficient. In a world where the rule of law is paramount, it is essential to seek legal authorities for all justifiable acts, however, that leaves a conundrum. What do you do when the law is not clear and there is a gap between the laws that exist and the laws that are necessary? Does one wait for the international community to negotiate an agreement or treaty, does one begin to develop a custom of law, or does one simply do one's best to take actions that follow the spirit, if not the letter, of the law until something more clear develops?

The alternative is to follow the historic experience of the international community by waiting until a truly tragic incident, in this case, on the high seas, occurs to change and develop the laws necessary to counter an emerging threat. While this article has attempted to provide several lawful ways for the modern MIOs to be carried out as necessary, there is an absence of clear authority in certain instances. The United States and the world community have an opportunity, and a responsibility, to utilize such operations to close these gaps and prevent terrorism. As the world grows smaller and closer through modern communications, technology, and transportation, international law must be constantly be re-evaluated to ensure that it keeps pace.