Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives

Craig H. Allen*

We could have other missile crises in the future—different kinds, no doubt, and under different circumstances. But if we are to be successful then, if we are going to preserve our own national security, we will need friends, we will need supporters, we will need countries that believe and respect us and will follow our leadership.

Robert F. Kennedy, Thirteen Days: A Memoir of the Cuban Missile Crisis

Introduction

On May 31, 2003, President Bush invited a number of like-minded States to join in a Proliferation Security Initiative (PSI) to counter the proliferation of weapons of mass destruction (WMD) and prevent them from falling into the hands of rogue regimes and terrorist organizations.¹ In the following year, the United States, together with eight NATO allies² and Australia, Japan, and Singapore, participated in a series of PSI planning sessions, experts’ meetings, exercises and operations to develop and refine the initiative. On September 4, 2003, the PSI participating States adopted a Statement of Interdiction Principles (reproduced in

* Judson Falknor Professor of Law, University of Washington School of Law, Seattle, Washington. After the paper was submitted, the Chairman of the Joint Chiefs of Staff issued a new instruction which superseded CJCS Inst. 3121.01A on which this article was based.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Appendix I), in which they agreed to “take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials.” Specific actions are to include vessel boardings at sea and in port. All such boardings are to be conducted in compliance with applicable international and national laws. Soon after the PSI was released, three open registry nations, Panama, Liberia and the Marshall Islands, which collectively represent more than half of the world’s shipping capacity by tonnage, entered into bilateral agreements with the United States that will allow the United States to conduct PSI boardings of vessels flagged in those States while in international waters. Cyprus, Croatia and Belize soon entered into similar agreements. By the time of the first anniversary meeting of the PSI States in Krakow, Poland on May 31 2004, sixty-two States had signaled their support for the PSI and the Russian Federation had joined the original group of core participants. The 9/11 Commission embraced the PSI and recommended that it be extended. In addition, the United Nations Security Council legitimated the core principles of the PSI by unanimously passing Resolution 1540 (reproduced in Appendix II), calling on all States to criminalize possession of WMD by, or the transfer or transport of WMD to, non-State actors. The resolution stopped short of conferring on non-flag States any new interdiction authority over vessels engaged in transporting WMD and delivery systems on the high seas. A proposal to add WMD interdiction authority to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) is presently under consideration.

As the PSI matures, maritime boardings under the Statement of Interdiction Principles may present a number of practical and legal issues. The first, an important but non-legal issue, is the safety of the boarding teams, who will be exposed not only to the risks associated with boarding potentially noncompliant vessels at sea (rather than in the comparative safety of a port), but might now also face the risk of exposure to radiological, biological or chemical materials and explosive devices. The second issue, which is related to the first, concerns the adequacy of boarding platforms, equipment and trained personnel to conduct the necessary detection, surveillance, screening, boarding, searching and seizure of vessels, cargoes and crews, while also carrying out the multitudinous other missions already imposed on the armed forces. The third issue that could be presented in some cases concerns the scope of a State’s authority to board and search foreign vessels in its ports and coastal waters, or to permit other States to conduct boardings in their coastal waters, and the authority of States other than the flag State to intercept, interrogate, board and seize vessels on the high seas, with or without consent of the flag State or master of the vessel or the authority of a UN Security Council resolution. The fourth area requiring examination will arise in cases where illicit WMD
or missile delivery materials are discovered during a boarding, and concerns the handling and disposition of those materials and the possible actions to be taken against the vessel and the owner and crew found to be involved in transporting WMD. The final issue—and the subject of this paper—concerns the legal limits on the use of force in carrying out WMD interception operations. Analysis of some of these questions has taken on added urgency in light of the fact that some US critics of the 1982 UN Convention on the Law of the Sea have urged the US Senate not to consent to accession to the treaty, in part because in the critics’ opinion the terms of the treaty would undermine the PSI.

Depending on the vessel’s location, flag and type, the threat level presented, and the goals of the mission, maritime detection, interception and enforcement operations in support of the PSI may involve a variety of Department of Defense (DoD) and/or Department of Homeland Security (DHS) platforms and personnel. At-sea measures to intercept vessels suspected of transporting WMD by DoD or DHS could potentially be carried out under one or more of the following frameworks: (1) boardings conducted pursuant to consent by the vessel’s flag State, the coastal State or vessel master; (2) maritime interception operations (MIO) to enforce embargoes imposed under the operative terms of a resolution by the UN Security Council or similar authority; (3) “expanded” maritime interception operations (E-MIO); (4) maritime law enforcement operations (MLE); (5) the peacetime right of approach and visit; (6) the customary law of countermeasures (self-help); (7) the right of individual or collective self-defense; or (8) the belligerent’s right of visit and search for contraband under the law of neutrality.

Vessel interceptions and boardings by naval vessels are generally carried out by visit, board, search and seizure (VBSS) teams drawn from the US Maritime Forces. Boarding teams from US Navy platforms may include Navy, Marine Corps and Coast Guard personnel. Coast Guard interception and boarding teams may also operate from Coast Guard boats or cutters or from allied naval vessels. In most cases, Coast Guard law enforcement detachments (LEDETs) on naval vessels serve under the operational or tactical control of the cognizant Coast Guard command authority when conducting boardings. In cases not calling for law enforcement measures, however, the LEDET may operate under DoD control, under the Coast Guard’s statutory authority to provide assistance to other agencies.

Experience has shown that interceptions and boardings by Navy and Coast Guard units occasionally require the use of force to overcome noncompliance or in self-defense. A number of standing and situation-specific documents promulgated by competent authorities establish doctrine and provide guidance applicable in situations involving the use of force during interception and boarding operations by DoD and Coast Guard units. At the same time, international law
and US municipal law impose limits on the use of force. Which laws and doctrines apply will depend on the particular situation, though some principles apply in virtually all situations. This article examines the legal limits on the use of force in maritime interception and law enforcement operations. It first provides the reader with an introduction to the nature of maritime interception and boarding operations, before turning to an examination of the international and US authorities regarding the use of force at sea. It then applies those authorities to situations that might arise in the course of WMD maritime interception operations.

Nature of Maritime Interception and Boarding Operations

WMD maritime interception operations by the United States can be traced back at least as far as the 1962 quarantine proclaimed by President Kennedy and enforced by the US Navy to halt the shipment of Soviet offensive missiles to Cuba. Navy doctrine notes that the term “quarantine” was later dropped from the planning terminology in favor of maritime interception operations. Contemporary maritime interception operations by the Navy are characterized by: (1) the source of their legal authority (usually a UN Security Council resolution); (2) the principle of proportionality between means and ends; (3) the principle of impartiality; and (4) a commitment to effectiveness. Only the National Command Authorities (“NCA”) (the President or Secretary of Defense) can authorize US forces to conduct MIO. Once the NCA approves US participation, the Chairman of the Joint Chiefs of Staff designates the combatant commander for the relevant geographic area to carry out the MIO. The authorization will address the level of force that may be used to carry out the MIO, the cargo or ships within the MIO prohibition, the geographic limits of the operation and the disposition of any cargo or ships found to be in violation of the governing resolution. Planning such operations is inevitably influenced by political constraints and resource limits.

Typically, the interception of a vessel suspected of transporting WMD or delivery systems will be based on an intelligence finding which is later developed through surveillance and reconnaissance, before moving to the “stop-and-search” phase of MIO. For example, a vessel observed loading suspicious cargo in a port might later be tracked by satellite, aircraft, radar, surface ship, submarine, or seabed sensors. When the vessel is encountered by an intercepting vessel or aircraft, it will be visually inspected for evidence of identity and flag. Visual surveillance might be followed by a radio inquiry, to determine or confirm its name, registry, homeport, last port, next port, cargo and passengers. The information obtained can then be checked against available information and intelligence databases. The vessel’s registry might also be confirmed with the flag State (if cooperative), and its
claimed next port of call might be contacted to determine whether the vessel has filed an advance notice of arrival and a copy of its cargo manifest. If suspicions remain, the vessel may be ordered to heave to and stand by for a boarding.

A VBSS team consisting of Navy and perhaps Marine Corps and Coast Guard LEDET personnel may be sent over by small boat or helicopter. If the MIO on scene commander concludes the boarding will be opposed or non-compliant, the VBSS team may be augmented by special operations forces. SEAL and Marine Corps Maritime Special Purpose Force (MSPF) members assigned to helicopter assault force teams are trained to fast-roped and deployed from helicopters to the deck of the ship (vertical take-downs), engage and neutralize any hostile forces aboard, and gain control of the vessel. Throughout the boarding, supporting helicopters hover overhead, with snipers stationed to provide cover to the boarding team. Alternatively, special operations personnel may “breach” the suspect vessel by small boat.

When the suspect ship is under control, a chemical, biological and radiological (CBR) team and/or explosive ordnance disposal (EOD) team might be placed aboard to sweep the vessel before the VBSS boarding begins. Once the VBSS team is aboard, all personnel on the boarded vessel are accounted for by the VBSS security team, and the sweep team conducts an initial safety inspection (ISI) to confirm the boarding can be conducted safely. The VBSS team members then examine the vessel’s registry and cargo documents. Under some circumstances, the boarding may extend to a search of all man-sized spaces, and an inspection of the cargo. In rare cases, the vessel may be diverted to a port or other sheltered location for a more detailed examination. Diversion may be necessary to search a vessel transporting containerized cargo since at-sea container inspections are at best difficult. If the boarding team has grounds for inspecting such cargo, the better alternative is often to divert the vessel to a port. Diversion may also be ordered if contraband is discovered. If evidence of a crime is discovered in the course of a visit, boarding or search personnel with law enforcement authority (the Coast Guard LEDET or foreign law enforcement agents) may be called on to arrest the offenders and seize the vessel and cargo.

**Authority for and Limits on the Use of Force in Maritime Interceptions and Boardings**

Any given approach and boarding operation on a vessel to intercept WMD or delivery systems could combine elements of the maritime interception and maritime law enforcement doctrines. Depending on the response by the master and crew of the suspect vessel, such operations can also raise questions regarding the source of
the applicable rules on any use of force by the Navy, Marine Corps and Coast
Guard members of the team.\textsuperscript{41} The authority to conduct an interception and
boarding\textsuperscript{42} must be distinguished from the authority for using force in such op-
erations. The authority to use force in an interception, boarding, search and seizure
may derive from (1) a State’s right under customary international law and the
State’s municipal law to use force as necessary to carry out law enforcement ac-
tions; (2) a UN Security Council resolution providing such authority;\textsuperscript{43} (3) the
State’s inherent right of self-defense recognized in Article 51 of the UN Charter;\textsuperscript{44}
or (4) the unit’s or individual’s right of self-defense. Depending on the circum-
stances, the exercise of force may be governed by international law, the laws of the
boarding State (the constitution, statutes and regulations) and any doctrine and
guidance promulgated by the service or services carrying out the operation. The
common denominator running through all those authorities is the mandate that
any action taken must be necessary to achieve a legitimate end and is reasonable
under the circumstances. As Chief Justice John Marshall opined in a Hovering Act
case two centuries ago, other States will oppose measures that are unreasonable,
but if a State’s enforcement measures are “reasonable and necessary to secure their
laws from violation, they will be submitted to.”\textsuperscript{45}

\textbf{US Doctrines on Use of Armed and Police Force}

In addition to limits on the use of force under international law and the Constitu-
tion and statutes of the United States (discussed below), members of the DoD and
DHS must comply with applicable directives regarding the use of force issued by
their command authorities.\textsuperscript{46} At the outset, a distinction must be made between
rules of engagement (ROE) and rules and policies on the use of force.\textsuperscript{47} As more
fully explained below, ROE are generally established by appropriate national and
subordinate command authorities to guide the armed forces in the use of force in
carrying out the national and homeland defense missions. The rules on the use of
force (RUF) for DoD elements and the Coast Guard Use of Force Policy (CGUFP)
are established by competent authorities to provide guidance on the use of force in
carrying out law enforcement and other civil support missions in support of home-
land security that do not call for the traditional use of armed force. It is also impor-
tant to recognize that not every use of force by a member of the armed forces
constitutes an application of “armed force” under the UN Charter and the law of
armed conflict.\textsuperscript{48} The focus of this article is on “police” force directed against pri-
ivate vessels or individuals who may be involved in transporting WMD, not
“armed” force against the territorial integrity or political independence of a State.\textsuperscript{49}
The article takes the position that it is the mission, not the uniform worn by the
actor, that determines how the force should be classified and which doctrine controls that use of force.

**Rules of Engagement (ROE)**

Rules of engagement are “directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground and air forces will initiate and/or continue combat engagement with enemy forces.” Adequate ROE appropriate to the situation are vital to mission success and protection of United States and allied assets. Even so, readiness, training and implementation deficiencies can prove devastating, as was learned in the 1983 terrorist bombing of the Marine barracks in Beirut, Lebanon, and re-learned following the al Qaeda attack on *USS Cole* in 2000. Members of the armed forces are well aware that any failure to obey controlling ROE is punishable as an orders violation under the Uniform Code of Military Justice (UCMJ). Additionally, a service member who violates the applicable ROE may lose affirmative defenses to assault or homicide charges under the UCMJ. However, the fact that official conduct may have violated an internal agency directive does not mean the conduct was unreasonable under the Fourth Amendment or a violation of international law.

Although much of the ROE doctrine and guidance is classified, a few general comments can be made. The ROE applicable to a given situation is typically drawn from national and subordinate command authorities, and may include rules promulgated by joint or combined command authorities. The three commonly cited bases for ROE are national policy objectives, operational requirements and the relevant law. The ROE include the Standing Rules of Engagement (SROE), which includes both self-defense and mission accomplishment rules, and any supplemental rules of engagement for specific operations, missions or projects. The SROE apply to military operations outside the territorial jurisdiction of the United States, even during peacetime. The ROE also govern actions to be taken by US forces during military homeland defense (HD) operations in the territorial jurisdiction of the United States. ROE do not apply to members of the armed forces when conducting military assistance to civil authorities missions, including missions in support of civil law enforcement agencies (discussed below). Under some circumstances the SROE are also applicable to Coast Guard units.

Naval units participating in multinational operations might find themselves operating under limitations imposed by the UN Security Council, the NATO Rules of Engagement or some other form of combined ROE. Like other ROE, the rules for naval units participating in multinational operations will include mission accomplishment and self-defense ROE. The need for common ROE doctrine in
such operations has long been recognized, however, the challenges of developing ROE for multinational forces can be daunting.

ROE must conform to the relevant international and national law. “International law” includes applicable international human rights laws in peacetime and international humanitarian law during an armed conflict. In should be noted that for strategic, operational and policy reasons the applicable ROE may well be, and frequently are, more restrictive than international or national law would require. In most cases, compliance with the ROE should constitute compliance with the applicable law. An exception to that rule of thumb might arise in operations governed by ROE prepared at a multinational level. Such combined ROE must of course comply with all relevant international law; however, the national laws of any given participant might be more restrictive. Potentially, a service member’s action might be found to have been in compliance with the combined ROE, but not with the member’s more restrictive national laws. Such disparities are best avoided through careful ROE drafting and implementation training.

The SROE make it clear that they do not limit a commander’s inherent authority and obligation to use all necessary means available and to take appropriate action in self-defense of the commander’s unit and other US forces in the vicinity. Self-defense is limited by the principles of necessity and proportionality. The current ROE provisions on self-defense direct that:

When the use of force in self-defense is necessary, the nature, duration, and scope of the engagement should not exceed that which is required to decisively counter the hostile act or demonstrated hostile intent and to ensure the continued protection of US forces or other protected personnel or property.

Program-specific doctrine may supplement or amplify the rules set out in the SROE. For example, to address the need for naval security personnel to determine whether approaching vessels possess a hostile intent in the post-Cole environment, the Secretary of Defense and Chief of Naval Operations have promulgated directives authorizing the use of warning shots against such threats.

DoD Rules for the Use of Force (RUF)
In addition to its principal national security mission, the Department of Defense has long provided support to civilian law enforcement agencies and to civil authorities. However, in part because the Posse Comitatus Act of 1879 (PCA) prohibits, with some exceptions, the direct use of the armed forces (other than the Coast Guard) to enforce US laws, the use of force by members of the armed forces within the territory of the United States is restricted.
Craig H. Allen

Under the Joint Doctrine for Homeland Security (under development at the
time this was written), DoD identifies two homeland security (HS) mission areas:
homeland defense (HD), with air, land and maritime components, and civil sup-
sport (CS). CS includes military assistance to civil authorities (MACA), which is
further broken down into military assistance for civil disturbances (MACDIS),
military support to civil authorities (MSCA) and military support to civil law en-
forcement agencies (MSCLEA).

The SROE recognize that not all situations involving the use of force are armed
conflicts under international law. DoD has now promulgated Rules for the Use of
Force (RUF) that address selected DoD mission areas not calling for the traditional
use of armed force. RUF refer to directives issued to guide US forces on the use of
force during CS operations in the territorial jurisdiction of the United States in
support of the HS mission area. The use of force by US military forces deployed on
CS missions within the territorial jurisdiction of the United States is not governed
by ROE. DoD forces deployed on CS missions are instead bound to adhere to the
RUF. RUF directives applicable in MACA operations may take the form of mis-

cious executive orders, deployment orders, memoranda of agreement, or plans.
Those RUF may be established by the deployment order or memorandum of
agreement, or by the Chairman of the Joint Chiefs of Staff instruction on the “Rules
on the Use of Force by DoD Personnel Providing Support to Law Enforcement
Agencies Conducting Counterdrug Operations in the United States.” RUF are re-
strictive, detailed and sensitive to political concerns, in recognition of the fact that
the CS mission area is characterized by restraints on weapons, tactics and levels of
force. RUF are subject to change during operations. As a result, DoD policy directs
military commanders to consult with their judge advocates to draft written RUF
guidance and design and implement an appropriate RUF training program, to en-
sure military forces under their command understand the RUF procedures.

USCG Use of Force Policy (CGUFP)

Congress has long recognized that effective maritime enforcement of laws and
treaties requires that the Coast Guard be authorized to use force when necessary to
carry out its enforcement of laws and treaties mission. Two federal statutes ex-
pressly address the use of force by the Coast Guard. The first, 14 U.S.C. § 637,
which was amended in 2004, addresses the use of force to stop a vessel “liable to sei-
zure or examination” by the Coast Guard. The second, 14 U.S.C. § 89, establishes
the general law enforcement authority of Coast Guard boarding officers and au-
 thorizes such officers to “use all necessary force to compel compliance.” In exercis-
ing the authority conferred by either statute, Coast Guard personnel and, in some

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situations, supporting DoD platforms and personnel, must comply with the Coast Guard’s Use of Force Policy (CGUFP).

The CGUFP is set out in the agency’s Maritime Law Enforcement Manual, which is designated “for official use only.” The CGUFP must be adhered to by all of the following while conducting Coast Guard missions, exercising the right of individual self-defense, and in situations where the SROE do not apply: (1) all Coast Guard personnel (military, civilian and contract security), (2) all Coast Guard vessels and Coast Guard aircraft specifically authorized by the Commandant of the Coast Guard to use force, (3) all non–Coast Guard personnel onboard a Coast Guard unit, (4) all non–Coast Guard units or personnel operating under Coast Guard tactical control (TACON) or operational control (OPCON).54 Coast Guard personnel follow the CGUFP even when the Coast Guard is not the lead federal agency.55 Coast Guard personnel do not, under any circumstances, apply foreign use of force policies.56 US Navy units operating under Coast Guard OPCON or TACON conducting law enforcement support operations follow the CGUFP for employing warning shots and disabling fire. Under those circumstances, the provisions of 14 U.S.C. § 637 (discussed below) extend to the naval unit.57 Navy units follow the SROE and/or mission specific ROE or RUF for all other purposes.58

The CGUFP includes provisions for the use of force against noncompliant vessels and against individuals. The provisions applicable to the use of force against individuals take the form of a “use of force continuum” that distinguishes between non-deadly force and deadly force. Deadly force is defined as any force that is likely to cause death or serious physical injury.59 Only that force reasonably necessary under the circumstances may be used. Force shall not be used where assigned duties can be discharged without the use of force. However, there is no duty to retreat to avoid law enforcement situations justifying the use of force, including deadly force. Like the SROE, the CGUFP emphasizes that covered personnel always have the inherent right to use all available means necessary to defend themselves or another from physical harm.60

The CGUFP provisions applicable to the use of force against noncompliant vessels61 address both the conditions for, and modalities of, using force to stop a vessel in a law enforcement situation. The provisions do not apply to vessel-on-vessel use of force in self-defense.62 In applying the CGUFP it is important to recognize that US practice differs in some respects from the practices of other nations. Some States categorically reject the use of force to stop noncompliant vessels for minor offenses or for offenses not involving public safety, such as fisheries violations. Other States apply the twin principles of necessity and proportionality in determining whether the use of force is appropriate to overcome a vessel’s noncompliance. It is also important to recognize that in the United States any use of
force, other than in self-defense, generally requires case-specific approval by the operational or tactical commander, who might well decline to approve the use of force even in situations where it would be permitted under the CGUFPC.

Under the CGUFPC and 14 U.S.C. § 637, warning shots are considered a “signal” to a vessel to stop, not a use of force.\textsuperscript{94} Warning shots are only used after other signaling methods have been tried without success. Warning shots are not used against aircraft or under circumstances where their use might endanger any person or property. Generally, warning shots are not used unless the enforcement units have the capability to deliver disabling fire if the warning shots are ignored. Disabling fire is the firing of ordnance at a vessel with the intent to disable it, with minimum injury to personnel or damage to the vessel. Under the CGUFPC, disabling fire is to be discontinued when the vessel stops, is disabled, enters the territorial sea of another State, or the situation changes in a manner that introduces substantial risk to those aboard the noncompliant vessel.\textsuperscript{95}

14 U.S.C. § 637 (reproduced, with 2004 amendments, in Appendix III) expressly authorizes disabling fire under limited circumstances and provides for an indemnity of vessel commanding officers called on to use disabling fire.\textsuperscript{96} Disabling fire may be used against vessels subject to “examination” or “seizure.” During the so-called “Rum War” of the Prohibition era, the Coast Guard used warning shots and disabling fire on numerous occasions to interdict vessels attempting to smuggle alcohol into the United States.\textsuperscript{97} The need for forcible interdiction measures arose again in the late 1970s, as Coast Guard and Navy units ranging in size from 82-foot patrol boats to 530-foot cruisers responded to a surge in maritime drug smuggling operations.\textsuperscript{98} Air and surface assets trained and equipped for assignment to the Coast Guard’s Operation New Frontier\textsuperscript{99} employ relatively novel means of stopping noncompliant vessels. The operation, which employs cutter-deployable, specially equipped high-speed over-the-horizon (OTH) boats and Coast Guard Helicopter Interdiction Tactical Squadron (HITRON) MH-68A (“Sting Ray”) helicopters, establishes a coordinated method to chase down and, if necessary, forcibly disable “go-fast” vessels engaged in unlawful activity.

**US Constitutional and Statutory Limits on the Use of Force**

Enforcement actions within the United States, including its territorial sea, or those involving US vessels beyond the territorial sea, or involving US nationals on foreign vessels beyond the territorial sea, are constrained by the US Constitution.\textsuperscript{100} When the Constitution applies, it is clear that Congress cannot by statute (e.g., 14 U.S.C. § 637 or 14 U.S.C. § 89) authorize what the Constitution forbids.\textsuperscript{101} Nevertheless, the US Supreme Court has recognized that application of the constitutional standards to maritime searches and seizures authorized by Congress
might vary from applications to similar actions carried out under the differing conditions prevailing on land. The Fourth Amendment to the Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and that no warrant authorizing such a search or seizure shall be issued in the absence of probable cause. The Fifth Amendment further provides that the government may not deprive any person of their life, liberty or property without due process of law. Both amendments potentially play a role in maritime interdiction and enforcement actions. Constitutional violations may lead to suppression of evidence, dismissal of charges and even suits for damages against the officers responsible for the violations. To ensure compliance with the constitutional limits, the Supreme Court has repeatedly emphasized the duty of law enforcement agencies to provide their officers with use of force training.

The Fourth Amendment seizure provision may be triggered by the seizure of a person, a vessel or property or papers on the vessel. Plainly, the Fourth Amendment applies to the actual arrest of a person by a law enforcement officer. An arrest must be based on probable cause and it must be conducted in a reasonable manner. “Excessive” force is by definition unreasonable. Allegations of excessive force during a detention or arrest typically arise in suits for damages against an enforcement officer, or the officer’s employing agency. On occasion, a defendant charged with assaulting a law enforcement officer will assert in defense an argument that excessive force by the enforcement officer justified self-defense measures in response. Where a defendant was subjected to “torture, brutality, and similar outrageous conduct” rising to the level that violates due process the court might even dismiss the charges against the defendant.

Actions by law enforcement officers that fall short of an actual arrest may nevertheless rise to the level of a “seizure” implicating the Fourth Amendment. For example, the Supreme Court has held that an “investigatory stop,” although not an arrest, is a seizure subject to the Fourth Amendment’s reasonableness requirement. However, such stops may be justified by a “reasonable suspicion” falling short of the probable cause that would be needed for an arrest. An officer conducting a so-called “Terry stop” may forcibly detain the individual if necessary. The Supreme Court has made it clear, however, that any use of force by the government to effect a seizure must be reasonable under the Fourth Amendment. As a result, the reasonableness test is the standard by which a claim of excessive force in any seizure (including mere investigatory stops) will be measured. In defining the contours of the reasonableness test the Supreme Court recognized: "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary
in a particular situation.”

Accordingly, the Court held, the reasonableness of the officer’s belief as to the appropriate level of force should be judged by that on-scene perspective. The Court has articulated a three-part balancing test that turns on the severity of the crime at issue, whether the suspect posed an immediate threat to others and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. If an officer reasonably, but mistakenly, believes that a suspect is likely to fight back, the officer is justified in using more force than might in fact be needed.

The Supreme Court has held that the reasonableness requirement for searches under the Fourth Amendment does not apply to actions by US law enforcement personnel acting outside US territory, when the action is taken against a non-national of the United States. Moreover, the reasonableness of foreign searches involving US nationals or vessels is judged by reference to the law of the place where it was conducted. Some writers argue that the Fourth Amendment might still apply extraterritorially to a case alleging excessive force in the seizure of a non-national. Extraterritorial conduct by law enforcement officers amounting to “deliberate and unnecessary lawlessness” has on one occasion led the court to dismiss the charges against the defendant. Alternatively (or additionally), such conduct may be analyzed under the applicable international human rights laws discussed below and the principles of State responsibility.

**International Law Limits on the Use of Force**

Earlier, this article highlighted the distinction between the two common usages of the term “force.” It was suggested that when the UN Charter speaks of “force” in Articles 2(4) and 41, it is referring to military force (aggressive and defensive; individual and collective) by one State or its proxies against another State. The term is also used, in a very different context, to refer to the means used by authorized government vessels and their agents to compel individuals to comply with enforcement actions. Such “police force” is not directed against a State and does not constitute “armed force,” nor does it violate the LOS Convention provisions reserving the seas for “peaceful purposes” and requiring States to refrain from the use of force in any manner inconsistent with the UN Charter. Nonetheless, it is possible that some acts conducted in the course of a law enforcement action against a vessel might be construed as an act of aggression; perhaps even a *casus belli* in former times. It is also important to bear in mind that international law imposes stricter limits on the use of force against aircraft than against vessels. Use of force against civil aircraft while in flight would likely violate the Montreal Convention protocol and federal law.
The exercise of law enforcement authority outside the territorial limits of the State is limited under international law. Under international law, the use of force in actions not amounting to armed conflict may be authorized or limited by treaty, such as a bilateral boarding agreement or the 2005 Protocol to the SUA Convention, customary international law and general principles of law. For the most part, international law is directly implicated only in incidents involving conduct directed against the nationals, vessels or aircraft of another State. International human rights law, including the International Covenant on Civil and Political Rights (ICCPR), may apply even to conduct by a State directed at one of its own nationals. Article 7 of the ICCPR, in language closely paralleling the Eighth Amendment of the US Constitution, prohibits torture and cruel, inhuman or degrading treatment or punishment. Article 9, echoing the Fifth Amendment, provides that no one shall be subjected to “arbitrary” arrest or detention, nor may the State deprive them of their liberty except on such grounds and in accordance with such procedures as are established by law.

When an interception and boarding is carried out under authority of a multilateral or bilateral agreement, the agreement itself may authorize or limit any use of force. Such is the case with the PSI boarding agreements entered into by the United States. Similarly, the draft SUA Protocol includes an express provision on the use of force during any action authorized within its framework. Any use of force other than in self-defense is therefore restricted to measures authorized by the treaty, as modified by any later case-specific verbal agreements. The interplay of conventional and customary law on the use of force in maritime law enforcement operations is demonstrated by three leading cases. The first case, concerning the I'm Alone, arose under a bilateral boarding treaty, but also briefly examines the use of force under customary law.

I'm Alone (1929)
The starting point for examining the international law limits on the use of force against a foreign vessel by maritime law enforcement authorities is the arbitration commission decision in the dispute arising out of the sinking of the auxiliary-powered schooner I'm Alone on March 22, 1929. The dispute arose after the Coast Guard cutter USCGC Wolcott intercepted the British flag (Canadian registered) vessel I'm Alone on March 20, 1929, anchored between 8 and 15 miles off the coast of Louisiana (the distance offshore was disputed by the parties). A 1924 treaty between the United States and Great Britain authorized the United States to board British flag vessels suspected of liquor smuggling while in close proximity to the US coast. Both governments agreed that the I'm Alone was “unquestionably” a notorious smuggling vessel, which transported liquor from Belize and the Bahamas.
for delivery to contact boats off the US coast, while staying just outside the US territorial sea.\textsuperscript{142} The contact boats then ran the liquor ashore, in violation of the National Prohibition Act. When the cutter \textit{Wolcott} approached, the master of \textit{I’m Alone}, asserting the US Coast Guard had no jurisdiction over his vessel, weighed anchor and began to flee southwest toward Mexico. The \textit{Wolcott} fired across the vessel’s bow and into the rigging, but the \textit{I’m Alone} continued to flee. Over the next two days, the \textit{Wolcott} followed the vessel in hot pursuit, eventually enlisting the assistance of two other Coast Guard cutters, the \textit{Dexter} and the \textit{Hamilton}. On March 22, 1929, after the chase had taken the vessels more than 200 miles from the US coast, the cutter \textit{Dexter} closed in on the \textit{I’m Alone} and once again ordered the vessel to heave to for boarding. After the master refused, the \textit{Dexter} fired across the vessel’s bow then into the sails and rigging. The \textit{Dexter} then ceased fire and once again ordered the vessel to stop or it would be sunk. According to the Coast Guard, the master of the \textit{I’m Alone} then brandished a pistol and told the \textit{Dexter} that he would forcibly resist any attempt to board his vessel. The \textit{Dexter} then resumed fire, this time into the hull of the \textit{I’m Alone}, sinking the vessel about thirty minutes later. The master and crew of the \textit{I’m Alone} jumped into the water as the vessel sank. The Coast Guard recovered all but one of the crewmen. That crewman, a French national, drowned before he could be recovered.

The arbitration panel appointed by the United States and Canada concluded that, assuming the United States had jurisdiction over the \textit{I’m Alone} under the 1924 treaty; the Coast Guard was justified in using “necessary and reasonable force for the purpose of effecting the objects of boarding, searching, seizing and bringing into port the suspected vessel; and if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purpose, the pursuing vessel might be entirely blameless.”\textsuperscript{143} The commissioners went on to conclude that the cutter’s act of intentionally sinking the \textit{I’m Alone} was not justified under either the 1924 treaty or any other principle of international law.\textsuperscript{144} Three observations are in order. First, the commission resolved the case under what they understood to be the prevailing international law standard. Second, the “reasonable and necessary force” standard articulated by the commissioners applied to all phases of the interception, from boarding through seizure.\textsuperscript{145} Finally, the commission did not attempt to flesh out its “reasonable and necessary” standard, other than to draw distinction between a sinking that was incidental and one that was intentional, nor did it explain whether the nature of the suspected offense (suspicion of liquor smuggling) was a factor to be considered in weighing the necessity or proportionality of the force used. It was sufficient for the commissioners to determine that the Coast Guard’s decision to intentionally sink the \textit{I’m Alone} under the circumstances exceeded that standard.
**Limits on the Use of Force**

*The Red Crusader (1961)*

Another commonly cited use of force case arose out of a 1961 enforcement action against the British fishing vessel *Red Crusader* by the Danish frigate *Niels Ebbesen*. On May 21, 1961, the trawler *Red Crusader* and several other fishing vessels were sighted near the Danish Faeroe Islands. The parties disputed the *Red Crusader*’s exact position and whether it was engaged in fishing. Upon sighting the *Red Crusader*, the *Niels Ebbesen* signalled it to stop by signal searchlight and siren. When those signals went unheeded, the Dane fired a blank 40 mm warning shot across the *Red Crusader*’s bow. The *Red Crusader* then stopped, and the *Niels Ebbesen* sent over a boarding party. The master of *Red Crusader* was notified that his vessel was under arrest and that he was to follow *Niels Ebbesen* into port. A two-man custody crew was placed aboard *Red Crusader*. After initially complying with the Danish frigate’s instructions, the master of the *Red Crusader* changed his mind, locked up the custody crew and attempted to flee with its embarrassed hostages. When the *Red Crusader*’s attempted flight became apparent to the commanding officer of the *Niels Ebbesen*, the frigate fired two 127 mm warning shots (one astern and one to starboard), accompanied almost immediately by a sound signal (Morse Code “K”) to stop. Two minutes later, it fired warning shots ahead of and to port of the *Red Crusader*, again closely followed by a whistle signal to stop. Fifteen minutes later, while *Red Crusader* continued to flee, the *Niels Ebbesen* fired solid (non-explosive) shots at the vessel’s scanner, mast, masthead light, hull and stem, while interspersing further warnings by loudhailer to stop. The vessel was damaged, but not sunk, and no one was injured. Britain protested the Danish action. The Commission of Enquiry later appointed by the two governments to investigate the matter determined that:

In opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the *Niels Ebbesen* exceeded legitimate use of armed force on two counts: (a) firing without warning of solid gun-shot; (b) creating danger to human life on board the *Red Crusader* without proved necessity, by the effective firing at the *Red Crusader* after 03.40.

The escape of the *Red Crusader* in flagrant violation of the order received and obeyed, the seclusion on board the trawler of an officer and rating of *Niels Ebbesen*, and Skipper Wood’s refusal to stop may explain some resentment on the part of Captain Sølling. Those circumstances, however, cannot justify such violent action.

The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure which he himself had previously followed.147
The commission did not specify what “other,” non-deadly means would have been appropriate in this fisheries enforcement action. Nor did it categorically rule out the use of force that might create a danger to human life in cases of “proved necessity.”

Interestingly, the commission was also called upon to examine the propriety of the conduct of the British naval vessel *HMS Troubridge*, which intervened in the confrontation. The Danish government initially protested that *Troubridge* had interfered with legitimate law enforcement measures by Denmark when *Troubridge* interposed herself between the other two vessels. Although Denmark withdrew parts of the question from the commission, the commission nevertheless offered its opinion that *Troubridge* “made every effort to avoid any recourse to violence between Niels Ebbesen and Red Crusader.” The commission went on to opine that “[s]uch an attitude and conduct were impeccable.” The two governments later agreed to mutually waive all claims and charges arising out of the incident.

*The M/V Saiga (1997)*

The most recent decision to examine the international law limits on the use of force in a maritime law enforcement boarding was issued in 1999 by the International Tribunal for the Law of the Sea (ITLOS) in the “*M/V Saiga* (No. 2) Case.” The suit—the first case brought before the new ITLOS—was initiated by the flag State, Saint Vincent and the Grenadines (“St. Vincent”), against the coastal State, the Republic of Guinea. The dispute arose out the forcible arrest by Guinea of the St. Vincent flag vessel *Saiga*. *Saiga* was a coastal tanker that refueled fishing vessels at sea. On the day before the incident *Saiga* had delivered gas oil to three fishing vessels in waters 22 miles offshore from Guinea. *Saiga* then moved to a position just outside the Guinean exclusive economic zone to await the arrival of several more vessels. At about 0800 on October 28, 1997, *Saiga* was, in the words of the Tribunal, “attacked” by Guinean patrol boat *P35* for an alleged violation of customs laws. Armed officers from *P35* then boarded the *Saiga*, seized the vessel and arrested the master and crew, firing their weapons at various times in the process. *Saiga* was taken to Conakry where the master was detained and the crewmembers’ travel documents were confiscated. Two crewmen who were injured by gunfire during the boarding were later allowed to travel to Dakar for medical treatment.

The Tribunal’s first ruling in the matter concerned St. Vincent’s application for prompt release of the *Saiga* and its crew upon the posting of reasonable security. The second decision concerned the merits and addressed a number of issues, including the use of force by the Guinean enforcement vessel. St. Vincent argued that Guinea’s use of force in stopping and boarding the vessel was excessive and unreasonable. St. Vincent pointed out that the *Saiga* was an unarmed tanker that was
almost fully laden with gas oil. The vessel was riding low in the water (and therefore easily boarded) and was capable of a speed of no more than ten knots. The crew offered no resistance. St. Vincent also called the Tribunal’s attention to the fact that P35 fired live ammunition, using solid shots from large-caliber automatic weapons. In response, Guinea asserted that the P35 crew’s actions were neither unreasonable nor unnecessary because the Saiga refused all visual, auditory and radio signals to stop. In its ruling, the Tribunal explained that:

Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the [LOS] Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, just as they do in other areas of international law.155

The Tribunal concluded that the Guinean patrol vessel fired live ammunition at the Saiga without first issuing any of the signals and warnings required by international law and practice. Once aboard the Saiga, Guinean enforcement personnel fired their weapons indiscriminately, despite the fact that the crew of the Saiga offered no resistance and did not threaten the boarding team. In the process, two of the Saiga crewmembers were seriously injured and vital equipment in the vessel’s radio room and engine room was damaged. The tribunal ordered the government of Guinea to make reparations to the vessel’s flag State. It relied in part on the I’m Alone and Red Crusader cases as the basis for its ruling and held that Guinea’s use of force before and after the boarding was excessive and endangered human life.136

In ruling against Guinea, the Tribunal also cited the enforcement provisions in the 1995 Straddling Fish Stocks Agreement,157 which was not in effect at the time of the decision, and in any event would not have been controlling in this dispute. Article 21 of the Straddling Fish Stocks Agreement provides a mechanism for States other than the flag State to exercise fisheries enforcement authority over foreign vessels on the high seas. Article 22 calls on parties conducting enforcement measures under Article 21 to ensure that their duly authorized fisheries inspectors “avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties.”158 The Tribunal concluded that Article 22 “reaffirmed” the “basic principle concerning the use of force in the arrest of a ship at sea.”159 Because the above quoted Article 22 provision was later incorporated into the bilateral WMD boarding agreements with Liberia and the Marshall Islands (discussed below), the Tribunal’s construction of Article 22 could prove relevant in construing the WMD boarding agreements.
Dire warnings on the continued use of deadly force in maritime interdiction and enforcement actions demonstrate a need for further development and clarification on the international limits on such actions. It is clear that customary law prohibits firing into a vessel without warning. Additionally, using gunfire to intentionally sink a fleeing vessel suspected of smuggling illegal liquor, at least without first attempting to disable it, violates the established rule that force must be necessary and reasonable. Such gunfire would almost certainly pose a threat to the lives of those aboard. But the full contours of the legal limits on the use of police force at sea remain unclear. In contrast to US law, international law has so far failed to recognize explicitly that the level of force that is reasonable and appropriate under the circumstances will vary according to the nature of the violation and the impact alternative enforcement approaches will have on the legal regime’s effectiveness. Force levels appropriate in interdicting a vessel engaged in narcotics trafficking might well be inappropriate to one suspected of violating fisheries laws in a coastal State’s EEZ. And the community interest in interdicting a WMD shipment under circumstances that threaten international peace and security could justify force levels that would be deemed excessive in response to a minor pollution incident. To be accurate, any contemporary statement of customary law must also account for a significant amount of State practice that is not easily reconciled with the broad statements made by the ITLOS in the M/V Saiga case. Finally, maritime use of force norms should be reexamined periodically in light of the progressive development in the law of State responsibility.

In their text on the *Law of the Sea*, Professors Churchill and Lowe take the position that international law, as articulated by the arbitral tribunal in the *I’m Alone Case*, permits States to use only the “minimum force” necessary to compel compliance. That position is generally consistent with the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the United Nations for enforcement operations ashore. Drawing on Article 3 of the UN Code of Conduct for Law Enforcement Officials, the Basic Principles state that “law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.” It generally argues against the use of firearms and asserts:

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These would include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be
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possible for law enforcement officials to be equipped with self-defense equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.168

The commentary accompanying the Code of Conduct “emphasizes that the use of force by law enforcement officials should be exceptional.” Although the Basic Principles are not binding in themselves, an argument can be made that when the UN Security Council authorizes enforcement measures under Article 41, with the proviso that such measures shall be carried out “in conformity with international standards,” the applicable standards might be construed to include the Basic Principles and Code of Conduct documents if the measures taken are in the nature of law enforcement actions.

Use of Force in Maritime PSI Interception Operations

The law applicable to the use of force in maritime operations to intercept WMD and their delivery systems will vary according to the legal basis for the action. The limits on the use of force to interdict the shipment of an operational WMD under circumstances amounting to an imminent act of “armed aggression” within the meaning of Article 51 of the UN Charter, or the belligerent’s right of blockade or visit and search under the laws of armed conflict and neutrality, will differ from those for enforcing a UN Security Council embargo, exercising a peacetime right of visit, conducting maritime law enforcement operations with respect to a vessel within the enforcing State’s jurisdiction, or while acting with the consent of the flag State, coastal State or vessel master. The use of force without legal justification or in a manner that is unreasonable may lead to State responsibility under international law or liability under the State’s municipal laws.169 And, of course, any attempt in peacetime to assert jurisdiction or control over a warship or government-owned vessel used only on government non-commercial service would constitute a serious breach of international law.170

The starting point in any examination of the use of force by US Maritime Forces during MIO and E-MIO operations is the applicable ROE.171 However, because most ROE doctrine is classified, this analysis will focus on the relevant international and US laws and to some extent the Navy MIO Doctrine and CGUFP, both of which are unclassified. The authority to use force other than in self-defense is derivative. Force may only be legitimately employed under circumstances where the interdicting vessel (or aircraft) has the lawful authority to compel a vessel to submit to its jurisdiction or control. If the vessel or aircraft has jurisdiction to enforce applicable laws or a right to exercise some measure of control over a vessel, as
in an exercise of the right of approach and visit, the vessel or aircraft also has the right to use reasonable force if necessary to compel compliance. For example, a warship justified in exercising a right of visit (an “examination” under 14 U.S.C. § 637) has the correlative right to use the necessary and reasonable force to compel compliance.  

If the WMD interception operation is carried out pursuant to a resolution of the Security Council, the measures available for enforcement derive from the resolution itself and any other applicable basis for asserting jurisdiction and control, along with the relevant mission accomplishment ROE. It is not uncommon, however, for Security Council resolutions to omit specific provisions on the use of force to enforce them. In construing and implementing the enforcement provisions of a Security Council resolution, it may be helpful to refer to the provisions of the Vienna Convention on the Law of Treaties (VCLT) for guidance, even though they are not directly applicable to Security Council resolutions. Article 31 of the VCLT instructs that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. The ordinary meaning of the terms used in a Chapter VII resolution by the Security Council may in some cases be determined by recourse to earlier resolutions by the Council, analogous treaties, and any statements by States regarding their understanding of those terms. It should also be borne in mind that the primary object and purpose of any resolution issued under Chapter VII is to maintain or restore international peace and security. Accordingly, any interpretation of the resolution should serve those ends. All members of the UN have an obligation to “accept and carry out” the decisions of the Council, in accordance with the Charter, giving such resolutions universal force. Article 32 of the VCLT permits recourse to “supplementary” means of interpretation and the circumstances of the treaty’s conclusion to confirm the meaning determined by applying Article 31 or to determine the meaning if application of Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. In some cases, an Article 32 approach to interpreting resolutions might justify resort to the record of any debate within the Security Council regarding the content and meaning of the resolution. In cases where the Council indicated in the resolution that it remains seized of the matter, recourse may always be made to the Council for clarification or supplementary guidance.

In consensual boardings the use of force other than in self-defense must generally be authorized by the consenting State. Operations conducted under authority of a bilateral boarding agreement with either the flag State or a coastal State in whose waters the vessel is located must comply with any limitations imposed by the
Limits on the Use of Force

The boarding agreements with Liberia and the Marshall Islands include the following provisions on the use of force:

Article 9
Use of Force

1. All uses of force pursuant to this Agreement shall be in strict accordance with the applicable laws and policies of the Party conducting the boarding and applicable international law.

2. Each Party shall avoid the use of force except when and to the degree necessary to ensure the safety of Security Force Officials and vessels or where Security Force Officials are obstructed in the execution of their duties.

3. Only that force reasonably necessary under the circumstances may be used.

4. Boarding and search teams and Security Force vessels have the inherent right to use all available means to apply that force reasonably necessary to defend themselves or others from physical harm.

5. Whenever any vessel subject to boarding under this Agreement does not stop on being ordered to do so, the Security Force vessel should give an auditory or visual signal to the suspect vessel to stop, using internationally recognized signals. If the suspect vessel does not stop upon being signaled, Security Force vessels may take other appropriate actions to stop the suspect vessel.  

As noted earlier, paragraph 2 of this article mirrors the use of force provision in the Straddling Fish Stocks Agreement, which the International Tribunal for the Law of the Sea concluded “reaffirmed” the “basic principle on the use of force in the arrest of a ship at sea.” However, one important feature distinguishes boardings under the WMD boarding agreements with Liberia and the Marshall Island from those conducted under the Straddling Fish Stocks Agreement. The WMD boarding agreements expressly provide that the “authorization to board, search and detain includes the authority to use force in accordance with Article 9 of this Agreement.” No such authority is included in the Straddling Fish Stocks Agreement. Article 9 of the Liberia and Marshall Islands agreements applies by its own terms only to operations carried out under authority of the agreement. Article 9 does not control in boardings carried out under an alternative basis of authority, such as a right of approach and visit, or boardings conducted while the vessel is located in waters over which a coastal State has jurisdiction.

The WMD boarding agreement with Panama takes the form of an amendment to an existing arrangement providing for cooperation in counter-narcotics detection and interdiction. The Panama agreement differs in several respects from the Liberia and Marshall Islands agreements. Like parallel provisions in the agreements
with Liberia and the Marshall Islands, Article X of the agreement with Panama provides that the "authorization to board, search and detain includes the authority to use force."182 However, Article XVII of the Panama agreement, which defines the limits on the use of force, differs in several respects. Article XVII draws on language common to bilateral counter-narcotics cooperative agreements (rather than the Straddling Fish Stocks Agreement), and adopts the prevailing international and national law standard:

Article XVII

1. All uses of force by a Party pursuant to this Supplementary Arrangement shall be in strict accordance with applicable laws and policies of that Party and shall in all cases be the minimum reasonably necessary under the circumstances, except that neither Party shall use force against civil aircraft in flight.

2. Nothing in this Supplementary Arrangement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of the Parties.183

Article XVII does not include the paragraph common to Article 22 of the Straddling Fish Stocks Agreement and Article 9 of the Liberia and Marshall Islands WMD boarding agreements. It is also noteworthy that the agreements the United States concluded with Liberia and the Marshall Islands expressly include authority for boardings to be conducted by the US Navy, while the Panama WMD boarding agreement contemplates that, except in emergencies, boardings will be carried out only by "law enforcement" officials.184

Non-Forcible Measures to Stop and Board

SQ3: “You should stop or heave to; I am going to board you.”185

As mentioned earlier, when a PSI interception and boarding is undertaken under authority of a Security Council resolution, questions regarding the use of force must begin with the authorizing resolution (see discussion above). The resolution will serve as the foundation for the National Command Authorities’ MIO authorization and the vessels’ operational tasking directives and ROE. Those documents should provide clear directions on the use of warning shots and disabling fire, and perhaps vertical take-down procedures if such a capability exists.186 All such guidance must conform to the relevant principles of international and national law.

It is well established that under international law force may be used only when necessary. The necessity for using force can only be established by demonstrating that lesser means were attempted and failed to produce the needed compliance, or that those lesser means would have been impossible or futile under the circumstances. The sequence of measures short of actual force must begin with an
identification of the enforcing vessel and its intentions.\textsuperscript{187} In the \textit{M/V Saiga Case}, the International Tribunal for the Law of the Sea identified at least two steps an enforcing vessel must take before using force against a noncompliant vessel.\textsuperscript{188} First, the vessel must be given an auditory or visual signal to stop using internationally recognized signals.\textsuperscript{189} If the signal is not heeded, the enforcing vessel is justified in firing one or more warning shots across the bow of the vessel in a manner likely to attract attention. Only if the signals and warning shots go unheeded is the enforcing vessel justified, as a last resort and after further warning the noncompliant vessel, in using disabling fire.\textsuperscript{190} Given the history of tribunals imposing on the enforcing State the burden of proving any use of force was necessary and reasonable, warnings given before firing warning shots or disabling fire should be recorded by videotape and audiotape when practicable. Prudent commanding officers will also require their crew to document the legal bases for taking interdiction or enforcement action against the suspect vessel before using force against the vessel.

When it applies, 14 U.S.C. § 637 requires the enforcing vessel to display its prescribed ensign, pennant or other identifying insignia.\textsuperscript{191} The suspect vessel is signaled by visual, auditory and electronic means. Traditional “visual” means include flag hoist and Morse Code flashing light signals taken from the International Code of Signals, such as the SQ5 signal quoted above.\textsuperscript{192} Auditory signals may be given by loudhailer or megaphone and supplemented by siren or whistle signals to attract the attention of those on board the suspect vessel. If necessary, the enforcing vessel’s intent may also be demonstrated by uncovering, readying and manning the ship’s weapons (without training them on the suspect vessel). Throughout the encounter, the enforcing vessel transmits radiotelephone calls to the suspect vessel over frequencies all vessels are required to monitor. The calls, which are commonly transmitted in English and any other language commonly used by vessels in the area or using internationally recognized signals for the International Code, informs the suspect vessel of the enforcing vessel’s intent to board.

If the signals and radio calls are ignored or the suspect vessel otherwise refuses to stop to permit boarding, the enforcing vessel may pursue one or more options in a progressive sequence. The Coast Guard MLEM prescribes a four-step approach for stopping noncompliant vessels. The sequence begins with “command presence,” progresses to “low-level” and then “higher-level” tactics, and finishes, if necessary, with “disabling fire.”\textsuperscript{193} The Navy MIO Doctrine adopts a similar approach. It prescribes—subject to the applicable ROE and tasking orders—an ordered sequence of levels of force to be used against noncompliant vessels that escalates, if necessary, from “nonviolent” signals and maneuvers, to “deterrence” measures (warning shots), to a “show of force” (including disabling fire), and finally to “full force.”\textsuperscript{194}
A variety of low-level force tactics designed to compel a fleeing vessel to stop have been tried over the years, including low level passes by aircraft; physically blocking or even “shouldering” the fleeing vessel; directing fire hose streams into the fleeing vessel’s exhaust stack to flood the engine; deploying nets, lines and other devices designed to entangle the vessel’s propellers; and severing the vessel’s fuel line. Low-level tactics are seldom successful in persuading a determined noncompliant suspect, particularly on merchant vessels of the size likely to be transporting WMD. Moreover, some of the tactics might even expose the pursuing vessel or a nearby support vessel to added risks. For example, if the fleeing vessel circles or doubles back, any nets and lines deployed in the water earlier to entangle the fleeing vessel might endanger the pursuing vessel as it turns to continue the pursuit.

If low-level tactics fail to induce the suspect vessel to comply, they may be followed by warning shots. Until recently, the federal statute governing the Coast Guard’s use of force against noncompliant vessels expressly required that warning shots always be fired before the enforcing vessel employed disabling fire. Any failure to first fire warning shots might have stripped the commanding officer of the indemnity provided by the statute. However, a 2004 amendment to 14 U.S.C. § 637 introduced an exception to the requirement. The amended statute no longer requires that warning shots be given before disabling fire if the person in command of the enforcing vessel “determines that the firing of a warning signal would unreasonably endanger persons or property in the vicinity of the vessel to be stopped.”195 It is important not to read too much into the 2004 amendment. To meet the standards set by international law for the use of force in maritime enforcement actions, the use of disabling fire without prior warning shots would still have to be preceded by an effective means of warning the fleeing vessel that force will be used against the vessel if it fails to comply with the enforcing vessel’s orders.196

The United States has long taken the position that a warning shot is a signal. Warning shots are not directed against the vessel or any person on board and do not constitute a use of force. Although international law is largely silent on the manner for firing warning shots, the CGUFP provides detailed guidance for Coast Guard platforms (and DoD platforms under Coast Guard TACON or OPCON). The CGUFP specifies the need for prior authorization from the operational or tactical commander, the visual, auditory and electronic warnings to be given to the vessel before firing the warning shot, the position and posture of the crew on the enforcing vessel, the choice of weapon and ammunition and the direction of fire relative to the suspect vessel.197 Like the CGUFP, the Navy MIO Doctrine provides specific direction on pre-fire warnings, the choice of weapon and ammunition and the weapon targeting method.198 The general directions set out in the MIO
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Doctrine must be applied consistently with the mission accomplishment ROE and operational tasking directives.

The use of warning shots to stop a vessel for boarding constitutes a “seizure” of the vessel in the constitutional sense and must therefore comply with the Fourth Amendment standard of reasonableness. The Court of Appeals for the Second Circuit applied the reasonableness standard to a case involving the Coast Guard’s use of warning shots against a Panamanian drug trafficking vessel on the high seas. The USCGC Tamaroa intercepted the 210-foot Panamanian mothership Roondiep fifty miles off Cape Cod and, with the consent of Panamanian authorities, ordered the vessel to heave to for boarding.\(^{199}\) The Roondiep refused, and after twice warning the vessel by radio, Tamaroa fired warning shots across the vessel’s bow using a .50 caliber machine-gun. The Roondiep eventually stopped and in the boarding that followed the team discovered a large quantity of marijuana in the hold. The defendants appealed their convictions on grounds that the boarding and seizure violated the Fourth Amendment. After first rejecting the Government’s argument that Panama’s consent provided an independent constitutional basis for the boarding, the Court of Appeals concluded that the interception was a reasonable investigatory stop and therefore did not violate the Fourth Amendment.\(^{200}\) The Court then turned to the warning shots:

The firing of warning shots to stop the Roondiep was not unreasonable, since reasonable force may be used if needed. The Roondiep had for some twenty minutes refused to stop upon request. The Coast Guard’s firing of warning shots into the water in front of the ship appears to have been the least drastic way to force the ship to stop, and the shots were directly attributable to the Roondiep’s refusal to submit to an authorized request to stop.\(^{201}\)

It is not clear whether the court considered the warning shots a use of force, rather than just one of several acts to consider in determining whether the Coast Guard’s seizure was reasonable under the circumstances. However, the court went on to hold that “the firing of warning shots appears to have been no more intrusive than the circumstances required to get the Roondiep to stop.”\(^{202}\) Accordingly, the Coast Guard’s actions were held to be reasonable.

**Use of Force to Stop and Board**

SQ1: **“You should stop or heave to; otherwise I shall open fire on you.”**\(^{203}\) The effectiveness of maritime legal regimes has long been a matter of concern.\(^{204}\) Even the most carefully crafted regime will fail to produce the desired public order if compliance is poor. Compliance is best achieved by a coordinated system of enforcement that detects, interdicts and punishes violators, thereby deterring future
violations. Any regime that allowed a violator to escape interdiction and punishment by simply registering the vessel with a closed or uncooperative flag State that refuses all requests to board is unlikely to be effective against a determined adversary. As one experienced commentator observed, MIO patrols would be ineffective if the patrol vessels lack the right to use force if necessary to stop ships.\textsuperscript{205} The late Professor Myres McDougal observed:

The authority to prescribe law, to make law, if it is to have any meaning must carry with it the authority to apply the law, decide what it is in particular instances, and to enforce it . . . Mr. Burke and I have collected the authorities on this for every type of area. It is our conclusion that you can be reasonably sure that states are authorized by international law to employ force when it is necessary to apply any law which they are authorized to make for the protection of their various exclusive interests. A comparable competence is established for the protection of the inclusive interests . . . The principal point . . . is that, by and large, the maintenance of order upon the oceans is a function of the application of force by the ships of nation-states.\textsuperscript{206}

It has been shown that the legitimacy of using force to stop a vessel subject to the enforcing State’s jurisdiction or control is well established under international practice, treaty law and US law.\textsuperscript{207} Although some condemn the use of force in fisheries and pollution enforcement actions as unreasonable and anachronistic, the need to preserve the authority to use force to compel compliance with the WMD non-proliferation regime is not so easily dismissed. Accordingly, at the international level a balance must be struck between the common interest in preserving freedom of navigation and limiting the use of force against vessels and their crews on the one hand, and the need to address the threat to international peace and security posed by the proliferation of WMD and delivery systems into the hands of rogue regimes and renegade non-State actors. As Professor Shearer recognized when he put the \textit{I’m Alone} decision in perspective in an earlier Blue Book series article:

\textquote{[T]he proportionality principle requires the enforcing State to weigh the gravity of the offense against the value of human life. Rum-running . . . did not strike the \textquote{[I’m Alone]} commissioners as sufficient to warrant such drastic action. They did not have to consider other cases. It is suggested that fisheries, revenue, immigration and other regulatory offenses would fall into the same category. So might pollution offenses. This is not only because sending a vessel with dangerous cargoes or wastes on board to the bottom might only compound the danger, but because of the Convention scheme . . . under which the flag State can be required to take enforcement action against the delinquent vessel escaping immediate arrest. Other cases might justify the use of more vigorous, and perhaps ultimately deadly, force, such as piratical vessels, vessels carrying arms to dissidents in the enforcing State, or craft carrying large quantities of dangerous}
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... drugs. These cases might be argued to have the character of self-defense or self-preservation more than of enforcement of regulatory laws.208

At the same time, any decision to use force at this early stage—to get aboard a suspicious vessel—must take into account that in most such cases the enforcing vessel will not yet have probable cause to believe the vessel is engaged in illegal activities or activities that give rise to a right of self-defense or self-help.

It has also been shown that use of force in MLE boardings may raise constitutional and statutory questions under US law. As with the firing of warning shots, the use of disabling fire by the Coast Guard to seize a vessel at sea must comply with the Fourth Amendment reasonableness standard. As the US Supreme Court explained in Graham v. Connor, a case involving the use of force against an individual, not a vessel, the court will consider the severity of the crime at issue, whether the suspect poses an immediate threat to others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight.209 The reasonableness standard, along with the governing international law standards, was applied to an incident involving the use of disabling fire in a joint Navy-Coast Guard counter-narcotics boarding off the Bahamas. In the interdiction, the USS Kidd (DDG-993), operating with a deployed Coast Guard LEDET, fired warning shots then .50 caliber machine-gun disabling fire to stop a stateless vessel on the high seas (the incident was the first use of disabling fire by a Navy ship in a counter-narcotics operation). Once aboard, the boarding team discovered over 57,000 pounds of marijuana on the vessel.210 On an appeal by the defendants of their conviction on drug trafficking charges, the court concluded that “the boarding and the seizure were not in conflict with United States statutes, international treaties or conventions, or the Constitution.”211 Nothing in the court’s decision suggests that the use of disabling fire to stop a fleeing vessel under those circumstances violates the Fourth Amendment.

When the on scene commander or commanding officer has determined that a suspect vessel will present either an opposed boarding or a noncompliant boarding the full range of use of force options described above may come into play.212 Those options may include the Coast Guard’s “higher level” tactics213 and disabling fire. “Disabling fire” refers to use of weapons to disable the ship without risk to the crew. The use of disabling fire by Navy and Coast Guard vessels conducting MLE operations is constrained by a variety of sources, including 14 U.S.C. § 637, as amended in 2004, the CGUFP set out in the MLEM, any applicable bilateral boarding agreement and tasking directives by OPCON or TACON. If disabling fire is used, the enforcing vessel’s method and choice of ammunition are limited by both service doctrine and international law. In the M/V Saiga Case, for
example, the International Tribunal for the Law of the Sea held that in its use of disabling fire the enforcement vessel should make every effort to ensure that life is not endangered. Service doctrines typically require that the enforcing vessel attempt to disable the noncompliant vessel with smaller caliber weapons. Such a sequence was followed by the Coast Guard cutter USCGC Boutwell in 1988 when it encountered the converted Panamanian supply ship Encounter Bay 600 miles off the coast of Washington. Boutwell first fired sixty .50 caliber machine-gun rounds into the drug trafficking vessel without any immediate effect. The Encounter Bay crew decided to comply with the boarding demand when Boutwell threatened to switch to the vessel’s deck gun.

Despite the general acceptance accorded to the use of disabling fire against vessels trafficking in drugs, as a practical matter few commanding officers or command authorities are likely to be anxious to shoot at vessels suspected of transporting nuclear, biological or chemical weapons or precursors. Moreover, they will recognize that the typical merchant ship is often able to survive even prolonged disabling fire by the weapons and ammunition allowed by the use of force doctrines. For example, in a 1990 interception of the 250-foot Panamanian freighter M/V Hermann suspected of transporting drugs, the Coast Guard cutter USCGC Chincoteague, with the consent of the flag State, fired over 130 rounds from the vessel’s 20 mm gun and 600 rounds from an M-60 machine-gun into the vessel’s engine spaces and rudder post. Despite the two-hour assault by Chincoteague, they were unable to disable the vessel before it entered the territorial sea of Mexico, at which point the Chincoteague was legally bound to discontinue the pursuit.

An effective alternative means of overcoming the suspect vessel’s noncompliance or even opposition—often without endangering the crew or potentially dangerous cargo on the suspect vessel—is available if the enforcing vessel has the capability of deploying a helicopter-borne special operations force boarding team. A vertical take-down may obviate the need for disabling fire against a noncompliant vessel and may therefore best meet the “reasonable and necessary force” test.

The efficacy of the vertical take-down alternative was demonstrated in the 2002 interdiction of the M/V So San by Spanish naval forces acting under the leadership of Spain’s former Prime Minister Aznar. In response to United States and British intelligence, the Spanish frigate Navarra, operating in support of Operation Enduring Freedom and seeking to prevent the escape of al Qaeda and Taliban forces from Afghanistan, intercepted the So San in the Indian Ocean approximately 600 miles from the Horn of Africa. No ship named So San appeared in any of the vessel registries. The vessel was flying no flag at the time of approach and displayed no
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indication of its State of registry or homeport. In fact, a North Korean flag on its funnel had been painted over, as were the Korean characters for So San. The master of the vessel provided only cursory answers to radio questions from the Navarra. He indicated that his vessel was registered in Cambodia and was carrying a cargo of cement to Yemen. The government of Cambodia could only confirm that the ship matched the description of a vessel registered in Cambodia under a different name. Concluding that the failure to fly a flag or display a name, together with the unverifiable claim of Cambodian registry, constituted reasonable grounds for suspecting that the ship was without a nationality (i.e., stateless), the Spanish frigate chose to exercise the internationally recognized right of a warship to “visit” a vessel on the high seas. The right of visit entitles a warship to send over a boat or aircraft to verify the ship’s right to fly its flag. The So San captain refused to slow down or to allow Navarra to board. Navarra then fired warning shots in an attempt to stop the So San, but the warnings were ignored. In fact, the So San increased its speed, making it impossible to board the ship by small boat. After a six-hour stand-off, Navarra prepared a special operations team of Spanish Marines to conduct a non-compliant boarding. To facilitate a vertical takedown, snipers on the Navarra first shot away the guy wires on the So San’s main mast that would have endangered the team when they fast-roped from the helicopter to the deck of the ship. Their path cleared, the Spanish team was able to get aboard and secure the vessel for the right of visit boarding. Most legal experts agree that the circumstances justified a right of visit boarding. And none of those who concluded the boarding was legitimate questioned the Spanish decision to shoot out the vessel’s obstructing cables. Had the Spanish lacked a vertical take-down capability, and therefore been forced to choose between resorting to disabling fire or forgoing the boarding, it is not clear whether the command authorities would have authorized disabling fire.

Use of Force to Divert, Arrest and/or Seize

It bears repeating that each progressive step in an interdiction from approach to seizure must be grounded in lawful authority. The authority to order a vessel to divert must be distinguished from a detention or formal seizure of the vessel. Similarly, the mustering or temporary detention of persons aboard a vessel to facilitate a boarding must be distinguished from the arrest of persons whom a law enforcement officer has probable cause to believe committed a crime within the enforcing State’s jurisdiction. The amount of force that may be “reasonable” for one form of seizure might be seen as unreasonable if used in another context.

Even a cursory inspection of the international and national legal regimes applicable to WMD, their precursors and delivery systems will reveal they are riddled with gaps (the UN Security Council recognized as much when it passed Resolution
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1540). As a result, a boarding team could find that the presence or transport of WMD components or delivery systems turned up by their laborious search do not violate any laws enforceable by the boarding State. For example, once aboard the M/V So San, the Spanish boarding team uncovered fifteen SCUD missiles and conventional (high explosive) warheads, along with parts to make eight more missiles and 23 barrels of chemicals (nitric acid) buried beneath tons of bagged cement. The missiles, which were sold by the government of North Korea to Yemen, were not listed in the vessel’s cargo manifest. Yet the legal analysts ultimately concluded that no applicable international law prohibited the sale or shipment of SCUD missiles from North Korea to Yemen. Accordingly, there was no legal basis for seizing the missiles, or taking further actions against the vessel or crew. The So San was released, to deliver its cargo to Yemen.

In circumstances where neither the vessel nor any of its crew has violated WMD possession or transportation laws enforceable directly by the boarding State, the boarding State may nevertheless find that one or more individuals aboard the vessel are suspected of having committed an offense that falls within the extradite or prosecute provision of an applicable international treaty. Such clauses are common in multinational terrorism conventions. Boarding teams and their commanders must recognize that their power (and duty) to detain such persons is limited. The treaty obligation to prosecute or extradite is generally triggered only when a person suspected of committing an offense under the treaty is within the “territory” of a contracting party. Such a provision would not justify apprehension of a person on a foreign vessel for extradition to a third State. On the other hand, the flag State may be under such an obligation if it is a party to a treaty requiring extradition. Such cases—like those involving asylum requests—call for careful handling by the enforcing vessel’s chain of command within the context of established interagency consultation procedures.

Assuming the authority to divert, detain arrest or seize exists, the question arises regarding what force may be used to carry out those actions. Vessels employed in MIO or E-MIO operations must consult their mission accomplishment ROE and operational tasking directives. The reader will also recall that the I’m Alone commissioners articulated an international law “necessary and reasonable force” standard that applies to all steps in the encounter, including the boarding, search and seizure and bringing the vessel into port. For Coast Guard boarding officers engaged in maritime law enforcement operations, 14 U.S.C. § 89 authorizes such officers to use all force necessary to compel compliance. That statutory authority must be applied within the limitations imposed by the constitutional provisions discussed above and the CGUFP. The CGUFP imposes limitations on the use of deadly force that are similar to, but more restrictive than, those in the Model Penal
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Code. Section 3.07 of the MPC begins by addressing the use of any force (deadly or non-deadly) in making an arrest. It provides that force is justifiable if the arresting officer believes its use is immediately necessary to effect the arrest. The MPC then imposes limits on the use of deadly force, providing that deadly force is not justifiable unless: (1) the arrest is for a felony; (2) the arresting officer believes that the force employed creates no substantial risk of injury to innocent persons; and (3) the arresting officer believes that the crime for which the arrest is made involved conduct including the use or threatened use of deadly force or the officer believes there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.231

The CGUFP is more restrictive than the MPC and better comports with the 1985 Tennessee v. Garner test described above.232 While the MPC is cast in the disjunctive, requiring only that the felony for which the arrest is being made involve the threat or use of deadly force or that there be a substantial risk that the person being arrested will cause death or serious bodily injury if apprehension is delayed, the CGUFP only authorizes the use of deadly force to effect an arrest if there is probable cause to believe that “the suspect has committed a felony involving the use or threatened use of deadly force” and the “suspect is armed, or otherwise poses an imminent threat of death or serious physical injury to any person.”233 A separate provision of the CGUFP authorizes the use of force, including deadly force, when necessary to protect hazardous materials or deadly weapons from theft, sabotage or unauthorized control.234 In addition, the boarding team has the inherent right to use force when necessary in self-defense.

Use of Force in Self-Defense
Throughout the approach and boarding it is important to distinguish the use of force to carry out the boarding, search and seizure from the use of force in self-defense. Regardless of the stage of the approach and boarding, the intercepting forces may be faced with actions requiring the use of force in self-defense. The ROE identify four levels of self-defense: individual self-defense (which includes defense of others), unit self-defense, national self-defense, and collective self-defense.235 Individual self-defense is the act of defending oneself or another person by using force. Unit self-defense is the act of defending a particular unit of US forces, or other US forces in the vicinity, against a hostile act or demonstrated hostile intent. Responses to a ramming or attempted ramming of a Coast Guard or DoD vessel, or vessel under Coast Guard TACON, would be governed by the SROE on unit self-defense.236 National self-defense is the act of defending the United States and, in some circumstances, US citizens and their property, and/or US commercial assets. Collective self-defense refers to the act of defending designated non-US forces or
designated foreign nationals and their property from a hostile act or demonstrated hostile intent.

The SROE and CGUFP recognize the inherent right of an individual and a unit to act in self-defense, subject to the twin constraints of necessity and proportionality.\textsuperscript{237} The definitions of necessity and proportionality in the self-defense context differ from parallel provisions in mission accomplishment ROE. “Necessity” for the use of force in self-defense exists when a hostile act occurs or when a force or terrorist exhibits hostile intent.\textsuperscript{238} “Proportionality” in the self-defense context refers to measures that are reasonable in intensity, duration and magnitude to the perceived or demonstrated threat, based on all the facts known to the commander at the time.\textsuperscript{239} The SROE make it clear that “all necessary means available” may be used in self-defense.\textsuperscript{240} Although the meaning of that phrase is classified, it can be said that when the hostile force no longer represents an imminent threat, the right to self-defense ends. Mission accomplishment ROE written to supplement the SROE do not limit the commander’s inherent authority and obligation to act in self-defense.\textsuperscript{241} Intentionally sinking the \textit{I’m Alone} (discussed above) was held to be excessive as an enforcement measure for a non-violent crime (smuggling alcohol). For those familiar with the ruthless determination of some modern traffickers in narcotics and illegal arms it is easy to imagine a circumstance in which it might be necessary to intentionally sink a trafficking vessel in self-defense.

The authority to exercise national or collective self-defense is generally more restrictive.\textsuperscript{242} The doctrine of unit self-defense is well established. In the \textit{Marianna Flora}, the Supreme Court recognized that a warship has no duty to flee or wait until she is crippled before defending herself with force. Writing for the Court, Justice Story held that the warship commander’s duty under such circumstances is plain: it is to “oppose force to force, to attack and to subdue the vessel.”\textsuperscript{243} Justice Story went on to explain that the commander:

\begin{quote}

had the flag of his vessel to maintain, and the rights of his cruiser to vindicate. To have hesitated in what was his duty to his government called for on such an occasion, would have been to betray (what no honourable officer could be supposed to indulge) an indifference to its dignity and sovereignty.\textsuperscript{244}
\end{quote}

The Court then upheld the boarding and seizure of the approached vessel, not for piracy but for the very act of firing on a US warship without legal justification.\textsuperscript{245} The Court of Appeals for the Ninth Circuit recently extended that principle, holding that a threat to open fire on the Coast Guard if its agents attempted to board provided independent grounds for seizing the vessel.\textsuperscript{246}
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The “no-duty-to-retreat” rule has been incorporated into Coast Guard doctrine, though it also acknowledges that under some circumstances temporary withdrawal might prove to be the wiser alternative, to provide time for the arrival of additional assets or personnel or to reduce tensions.247 Similarly, under the SROE guidelines on “de-escalating the situation,” when time and circumstances permit, a hostile force should be warned and given an opportunity to withdraw or cease any threatening activities.248

Conclusion

UN Security Council Resolutions 1373 and 1540 provide stark warning of the grave threat to international security posed by global terrorism and the proliferation of WMD and their delivery systems. For some, the resolutions also demonstrate that the presumption in the 1945 UN Charter that nation-States will hold a monopoly on the large-scale use of force must be reevaluated. It is too soon to predict whether those resolutions will eventually serve as the basis for new crimes of universal jurisdiction or progressive development of the right of approach and visit under the law of the sea. In the meantime, while the Security Council monitors progress on the implementation of its terrorism and counter-proliferation resolutions, nations participating in the PSI and those cooperating with them will move forward with a pragmatic and adaptive program to counter the growing threat posed by the conjunction of global terrorism and WMD proliferation. Given the physical nature of most WMD and delivery systems of concern and the likely routes they will follow from their sources to intended users, the PSI must include a maritime interception component if it is to succeed. To be effective, maritime interception must include provisions for using reasonable force when necessary to overcome non-compliance. As both a legal and practical matter, the enforcing vessel cannot simply continue a pursuit indefinitely.249 Even an enforcing vessel with unlimited fuel and patience—and no other pressing mission—must terminate its pursuit if the pursued vessel enters the territorial sea of a third State, unless that State consents to an enforcement action in its waters or such action is authorized by an applicable resolution of the UN Security Council.250

International law and the national laws of the States participating in PSI maritime operations impose limits on the use of force. Through the Statement of Interdiction Principles, the PSI participants have pledged to conform their operations to international and national law. The exact contours of that law have yet to be fully defined. For example, customary law has yet to expressly acknowledge that as the threat to international or national security increases higher levels of force in enforcement measures may be justified. Cases involving the use of force in fisheries
enforcement are inapposite where the danger of ineffective enforcement is not merely over-fishing, but rather permitting nuclear, biological or chemical weapons to come into the possession of a rogue regime or terrorist group. Even if the law were fully developed, it would not lessen the need for use of force policies and case-by-case decision-making grounded in informed risk assessment and management principles. The risk of using disabling fire against a vessel carrying WMD or component materials, and the low probability of success, cast serious doubt on whether such measures are likely to be employed. Accordingly, innovative methods, such as vertical take-downs or breaches of non-compliant vessels by small boat, may become an increasingly common feature of maritime interception operations. Both options expose the boarding team members to greater risk from the nature of the operation and potential opposition by the boarded vessel; however, the risk to global security posed by a course of passive inaction is likely to be even greater.

A given PSI interception may implicate national defense, homeland security and/or law enforcement mission responsibilities. Accordingly, US maritime forces and their legal advisers must be prepared to apply what are often subtle distinctions among three distinct but sometimes overlapping systems of rules governing the use of force at sea. Policy makers and planners for PSI participating States must bear in mind that in framing a use of force approach for what will often be a combined operation they must strive to fashion an approach that recognizes that national attitudes on the use of force in maritime boardings may differ, even when they are grounded in universally applicable Security Council resolutions. The execution of those use of force policies will also shape and influence customary law on the use of force and on State responsibility in the years to come.
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Appendix I
Interdiction Principles for the Proliferation Security Initiative

PSI participants are committed to the following interdiction principles 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 UN Security Council. They call on all states concerned with this threat to international peace and security to join in similarly committing to:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern. “States or non-state actors of proliferation concern” generally refers to those countries or entities that the PSI participants involved establish should be subject to interdiction activities because they are engaged in proliferation through: (1) efforts to develop or acquire chemical, biological, or nuclear weapons and associated delivery systems; or (2) transfers (either selling, receiving, or facilitating) of WMD, their delivery systems, or related materials.

2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts.

3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.

4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:
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a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.

b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas, or areas beyond the territorial seas of any other state, that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concern, and to seize such cargoes that are identified.

c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.

d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.

e. At their own initiative or upon the request and good cause shown by another state, to (a) require aircraft that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and that are transiting their airspace to land for inspection and seize any such cargoes that are identified; and/or (b) deny aircraft reasonably suspected of carrying such cargoes transit rights through their airspace in advance of such flights.

f. If their ports, airfields, or other facilities are used as transshipment points for shipment of such cargoes to or from states or non-state actors of proliferation concern, to inspect vessels, aircraft, or other modes of transport reasonably suspected of carrying such cargoes, and to seize such cargoes that are identified.
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Appendix II

Security Council
4956th Meeting (PM)*

The Security Council,

Affirming that proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security,

Reaffirming, in this context, the Statement of its President adopted at the Council’s meeting at the level of Heads of State and Government on 31 January 1992 (S/23500), including the need for all Member States to fulfil their obligations in relation to arms control and disarmament and to prevent proliferation in all its aspects of all weapons of mass destruction,4

Recalling also that the Statement underlined the need for all Member States to resolve peacefully in accordance with the Charter any problems in that context threatening or disrupting the maintenance of regional and global stability,

Affirming its resolve to take appropriate and effective actions against any threat to international peace and security caused by the proliferation of nuclear, chemical and biological weapons and their means of delivery, in conformity with its primary responsibilities, as provided for in the United Nations Charter,

Affirming its support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of nuclear, chemical or biological weapons and the importance for all States parties to these treaties to implement them fully in order to promote international stability,

Welcoming efforts in this context by multilateral arrangements which contribute to non-proliferation,

Affirming that prevention of proliferation of nuclear, chemical and biological weapons should not hamper international cooperation in materials, equipment and technology for peaceful purposes while goals of peaceful utilization should not be used as a cover for proliferation,
Gravely concerned by the threat of terrorism and the risk that non-State actors** such as those identified in the United Nations list established and maintained by the Committee established under Security Council resolution 1267 and those to whom resolution 1373 applies, may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery,

Gravely concerned by the threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials,** which adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security,

Recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security,

Recognizing that most States have undertaken binding legal obligations under treaties to which they are parties, or have made other commitments aimed at preventing the proliferation of nuclear, chemical or biological weapons, and have taken effective measures to account for, secure and physically protect sensitive materials, such as those required by the Convention on the Physical Protection of Nuclear Materials and those recommended by the IAEA Code of Conduct on the Safety and Security of Radioactive Sources,

Recognizing further the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

Encouraging all Member States to implement fully the disarmament treaties and agreements to which they are party,

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, Determined to facilitate henceforth an effective response to global threats in the area of non-proliferation,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport,
transfer or use nuclear, chemical or biological weapons and their means of delivery;

2. *Decides also* that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

3. *Decides also* that all States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

   (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;

   (b) Develop and maintain appropriate effective physical protection measures;

   (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law;

   (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations;

4. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, for a period of no longer than two years, a Committee of the Security Council, consisting of all members of the Council, which will, calling as appropriate on other expertise, report to the Security Council for its examination,
on the implementation of this resolution, and to this end calls upon States to
present a first report no later than six months from the adoption of this resolution
to the Committee on steps they have taken or intend to take to implement this
resolution;

5. \textit{Decides} that none of the obligations set forth in this resolution shall be
interpreted so as to conflict with or alter the rights and obligations of State Parties
to the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and
the Biological and Toxin Weapons Convention or alter the responsibilities of the
International Atomic Energy Agency or the Organization for the Prohibition of
Chemical Weapons;

6. \textit{Recognizes} the utility in implementing this resolution of effective national
control lists and calls upon all Member States, when necessary, to pursue at the
earliest opportunity the development of such lists;

7. \textit{Recognizes} that some States may require assistance in implementing the
provisions of this resolution within their territories and invites States in a position
to do so to offer assistance as appropriate in response to specific requests to the
States lacking the legal and regulatory infrastructure, implementation experience
and/or resources for fulfilling the above provisions;

8. \textit{Calls upon} all States:

\begin{itemize}
\item[(a)] To promote the universal adoption and full implementation, and, where
necessary, strengthening of multilateral treaties to which they are parties,
whose aim is to prevent the proliferation of nuclear, biological or chemical
weapons;
\item[(b)] To adopt national rules and regulations, where it has not yet been done,
to ensure compliance with their commitments under the key multilateral non-
proliferation treaties;
\item[(c)] To renew and fulfil their commitment to multilateral cooperation, in
particular within the framework of the International Atomic Energy Agency,
the Organization for the Prohibition of Chemical Weapons and the Biological
and Toxin Weapons Convention, as important means of pursuing and
achieving their common objectives in the area of non-proliferation and of
promoting international cooperation for peaceful purposes;
\end{itemize}
(d) To develop appropriate ways to work with and inform industry and the public regarding their obligations under such laws;

9. *Calls upon* all States to promote dialogue and cooperation on non-proliferation so as to address the threat posed by proliferation of nuclear, chemical, or biological weapons, and their means of delivery;

10. Further to counter that threat, *calls upon* all States, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials;

11. *Expresses* its intention to monitor closely the implementation of this resolution and, at the appropriate level, to take further decisions which may be required to this end;

12. *Decides* to remain seized of the matter.

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* The 4955th Meeting was closed.
** Definitions for the purpose of this resolution only:

*Means of delivery:* missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.

*Non-State actor:* individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

*Related materials:* materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery.
(a) (1) Whenever any vessel liable to seizure or examination does not stop on being ordered to do so or on being pursued by an authorized vessel or authorized aircraft which has displayed the ensign, pennant, or other identifying insignia prescribed for an authorized vessel or authorized aircraft, the person in command or in charge of the authorized vessel or authorized aircraft may, after a gun has been fired by the authorized vessel or authorized aircraft as a warning signal, fire at or into the vessel which does not stop.

(2) Before firing at or into a vessel as authorized in paragraph (1), the person in command or in charge of the authorized vessel or authorized aircraft shall fire a gun as a warning signal, except that the prior firing of a gun as a warning signal is not required if that person determines that the firing of a warning signal would unreasonably endanger persons or property in the vicinity of the vessel to be stopped.

(b) The person in command of an authorized vessel or authorized aircraft and all persons acting under that person’s direction shall be indemnified from any penalties or actions for damages for firing at or into a vessel pursuant to subsection (a). If any person is killed or wounded by the firing, and the person in command of the authorized vessel or authorized aircraft or any person acting pursuant to their orders is prosecuted or arrested therefor, they shall be forthwith admitted to bail.

(c) A vessel or aircraft is an authorized vessel or authorized aircraft for purposes of this section if—

(1) it is a Coast Guard vessel or aircraft; or

(2) it is a surface naval vessel or military aircraft on which one or more members of the Coast Guard are assigned pursuant to section 379 of title 10; or

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(3) subject to subsection (d), it is a naval aircraft that has one or more members of the Coast Guard on board and is operating from a surface naval vessel described in paragraph (2).

(d) (1) The inclusion of naval aircraft as an authorized aircraft for purposes of this section shall be effective only after the end of the 30-day period beginning on the date the report required by paragraph (2) is submitted through September 30, 2001.

(2) Not later than August 1, 2000, the Secretary of Defense shall submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate a report containing

(A) an analysis of the benefits and risks associated with using naval aircraft to perform the law enforcement activities authorized by subsection (a);

(B) an estimate of the extent to which the Secretary expects to implement the authority provided by this section; and

(C) an analysis of the effectiveness and applicability to the Department of Defense of the Coast Guard program known as the “New Frontiers” program.

(d) Report- The Commandant of the Coast Guard shall transmit a report annually to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives describing the location, vessels or aircraft, circumstances, and consequences of each incident in the 12-month period covered by the report in which the person in command or in charge of an authorized vessel or an authorized aircraft (as those terms are used in section 637 of title 14, United States Code) fired at or into a vessel without prior use of the warning signal as authorized by that section.

Notes

3. NATO members participating in the PSI since its inception include France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and the United Kingdom. Canada and Norway joined several months later.

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5. Id., para. 4.
8. Final Report of the National Commission on Terrorist Attacks Upon the United States 381 (2004). The commission concluded the “PSI can be more effective if it uses intelligence and planning resources of the NATO alliance. Moreover, PSI membership should be open to non-NATO countries. Russia and China should be encouraged to participate.” The PSI was always open to non-NATO States. And well before the commission entered its final report, Russia had already joined the PSI and China appeared to have no interest in joining.
10. Reportedly China agreed to support the resolution only after a provision that would have permitted interdiction at sea was removed. Warren Hodge, Ban on Weapons of Doom is Extended to Qaeda-Style Groups, NEW YORK TIMES, Apr. 29, 2004.
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LEGAL MATERIALS 1261 (1982) [hereinafter LOS Convention]. The United States is not yet a party.


16. The term “maritime interception operations” has taken on a variety of meanings over time. It was originally used in a narrow sense to refer only to naval operations taken to enforce the UN Security Council resolutions imposing embargoes. The Navy now defines MIO as the “legitimate action of denying suspect vessels access to specific ports for import or export of prohibited goods to or from a specified nation or nations, for purposes of peacekeeping or to enforce imposed sanctions.” See US Navy, Maritime Interception Operations, ¶ 1.5.12, NTTP 3-07.11/CGP 3-07.11 (2003) [hereinafter Navy MIO Doctrine]. The Navy MIO doctrine does not apply to naval blockades in time of war. Id. ¶ 1.3. In fact, Navy doctrine acknowledges there are “crucial differences between MIOs and belligerent acts of interdiction such as blockade and visit and search during international armed conflict.” See US Navy, Naval Doctrine for Military Operations Other-Than-War, ¶ 3.2.2.1, NWP 3-07 (1998) [hereinafter Navy MOOTW Doctrine].

17. “Expanded MIO,” when authorized by the Secretary of Defense, are designed to intercept targeted personnel or material that pose an imminent threat to the United States. E-MIO may involve multinational forces and may be implemented even when sanctions have not been imposed. See Navy MIO Doctrine, supra note 16, ¶ 1.5.6.

18. The Coast Guard defines “law enforcement” as “all Coast Guard functions or actions carried out pursuant to the legal authorities described in” the Maritime Law Enforcement Manual. See US Coast Guard, Maritime Law Enforcement Manual, ¶ 4.A.2, COMDTINST M16247.1C (2003) [hereinafter Coast Guard MLEM].

19. See LOS Convention, supra note 14, art. 110.


23. The fact that a given boarding is conducted under the MIO/VBSS framework does not indicate the nature or scope of the boarding or the legal authority on which it relies. Similarly, the fact that a Coast Guard LEDET accompanies a Navy VBSS team does not necessarily indicate the boarding falls within the maritime law enforcement rubric. See Navy MIO Doctrine, supra note 16, ¶ 2.2.4. The Memorandum of Understanding Between the Department of Defense and Department of Transportation [now Homeland Security] on the Use of USCG Capabilities and
Resources in Support of National Military Strategy (Oct. 3, 1995) defines five categories of the Coast Guard that may be made available to support the National Military Strategy, including, *inter alia*, maritime interception operations, peacetime military engagement and coastal sea control.

24. The actions may also trigger an operational report (OPREP) or situation report (SITREP) message reporting requirement. See Chairman of the Joint Chiefs of Staff Manual 3150.05 (series); Chairman of the Joint Chiefs of Staff Manual 3150.3 (series); Office of the Chief of Naval Operations Instruction 3100.6 (series).

25. Proclamation No. 3504, 27* Federal Register* 10,401 (Oct. 23, 1962). The Proclamation authorized the use of force only in cases of failure or refusal to comply, after reasonable efforts had been made to communicate directly with the vessels, or in cases of self-defense, and then only to the extent necessary.

26. See Navy MOOTW Doctrine, *supra* note 16, at 3-2 n.4. NATO prefers the phrase Maritime Interdiction Operations (MIOPs). In the United States “interdiction” is defined as activities designed to “divert, disrupt, delay or destroy” the adversary’s potential to inflict harm before it can be used effectively against friendly forces. See Joint Chiefs of Staff, Joint Pub 3-03, Joint Interdiction Operations (1997).

27. The principle of impartiality is also manifested in the 1982 LOS Convention’s articles banning discrimination. See, e.g., LOS Convention, *supra* note 14, arts. 24(1)(b), 25, 26, 42(2), 52(2) & 227.

28. Navy MIO Doctrine, *supra* note 16, at 3-3. The principle of impartiality does not require that all vessels be stopped. Effectiveness is measured by the extent to which MIO furthers compliance with the sanctions.

29. *Id.* at 3-4.

30. *Id.*


32. Enforcement vessels will no doubt recognize the security risks posed by requiring vessels to transmit sensitive information by radio transmissions that are easily intercepted by other vessels or shore stations.

33. VBSS team members attend individual and team training to learn boarding procedures, vessel control tactics, levels of force, take-down procedures and search techniques. Team members are trained in non-lethal and lethal use of force techniques. See generally Navy MIO Doctrine, *supra* note 16, ¶ 4.3.1 & App. H.

34. The Navy distinguishes between “opposed” boardings and “noncompliant” boardings, the former of which present a higher risk. See *id.* ¶ 1.5. Special operations forces are always used in opposed boardings, and may be used in noncompliant boardings. Ship’s force VBSS teams are not authorized to conduct opposed boardings, *id.* ¶ 6.1, or noncompliant boardings on vessels with high freeboard. *Id.* ¶ 6.6.

35. Special operations forces may be drawn from a SEAL or MSPF team. The MSPF element within Marine expeditionary units (special operations capable) provides the direct action capability and carries out the VBSS mission in support of maritime interception operations. See Navy MOOTW Doctrine, *supra* note 16, ¶ 3.2.2.5. On naval vessels without an embarked MEU, similar support may be available from a Marine security force battalion or one of its fleet antiterrorism security teams (FAST).

37. Navy MIO Doctrine, *supra* note 16, ¶ 6.6.2. “Breaching” refers to boarding by small boat without the cooperation of the boarded vessel, and may require overcoming passive measures to obstruct the boarding. It is considered “extremely dangerous.” *Id.*

38. *Id.* ¶ 5.6.2.2.

39. Diversions have been directly addressed in the context of the belligerents’ right of visit and search. See *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* 32, ¶ 121 (Louise Doswald-Beck, ed. 1995). At the time the Manual was written, some concluded that a right to compel diversion had not yet ripened into a rule of customary law. See Louise Doswald-Beck, *Current Developments: The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 192, 202 (1995).

40. Navy VBSS and Coast Guard LEDET teams have implemented a number of innovations to overcome the difficulties of at-sea container inspections, including the use of sophisticated climbing equipment and techniques. See Navy MIO Doctrine, *supra* note 16, Annex D, ¶ D.5.

41. The choice of rules can be even more complex if the operation includes military or law enforcement personnel from other nations. See Navy MIO Doctrine, *supra* note 16, ¶¶ 2.4 & 2.5.

42. The legal authorities on which WMD interception operations may be founded are beyond the scope of this article.


46. See, e.g., US Navy Regulations (1990), arts. 0915 (use of force against another State) & 0914 (violations of international law and treaties).

47. It is sometimes said, even in introductory use of force training sessions, that there is little or no meaningful difference between the SROE, the RUF and the CGUF. Staff judge advocates and law specialists must be alert to correct such simplistic assertions and their tendency to blur vital distinctions between the doctrines. The more difficult challenge will be to justify the need for multiple doctrines and the potential to inject confusion into one of the commander’s most important planning and operational decisions.

48. The distinction is implicit in the UN Security Council’s Resolution 221 imposing an embargo on the former Rhodesia. Although not explicitly stated, the resolution was issued under Article 41 of the UN Charter, which is limited to measures not including the use of armed force. Nevertheless, the Council authorized the enforcing State to use force to compel compliance with the embargo. See U.N. Security Council Resolution 221, para. 5, U.N. Doc. S/RES/221 (1966)
(authorizing the United Kingdom to "prevent, by the use of force if necessary" the arrival of tankers in (Portuguese controlled) Beira). By Resolution 217 issued the year before, the Council had imposed an "embargo on oil and petroleum products" to Rhodesia. See U.N. Doc. S/RES/217 (1965), para. 8.

49. See PHILIP C. JESSUP, A MODERN LAW OF NATIONS 162 (1952). Judge Jessup took the position that a use of armed force violates Article 2(4) of the Charter only if it is directed against the territorial integrity or political independence of a State.


51. Despite the fact that the US embassy in Beirut had been bombed just six months earlier, the United States had not taken any additional precautions at the Beirut barracks, nor, reportedly, had the on scene commander requested an ROE review or revision. The incident raised serious questions about why, in such a high-risk environment, the sentries’ weapons were not loaded.

52. BRUCE BERKOWITZ, THE NEW FACE OF WAR: HOW WAR WILL BE Fought IN THE 21ST CENTURY 117 (2003) (reporting that the safety of the Cole "depended totally on a handful of twenty-year-old sailors armed with unloaded M-16s, squinting into the noonday sun and trying to figure out why two guys in a skiff were waving at them as they approached").

53. Perhaps the best known case concerned General John LaVelle, USAF, commander of the Seventh Air Force in Viet Nam in 1971, who was relieved of command and demoted for charges relating to violations of applicable ROE and reporting requirements. See BERKOWITZ, id. at 151. More recently, an Illinois Air National Guard pilot received non-judicial punishment under Article 15 of the Uniform Code of Military Justice for, inter alia, violating the rules of engagement during Operation Enduring Freedom in Afghanistan. The flag officer who imposed the punishment found that the pilot "blatantly ignored the applicable rules of engagement and special instructions." See U.S. Pilot Found Guilty in 'Friendly Fire' Incident, CNN.COM NEWS, July 6, 2004, at http://www.cnn.com/2004/LAW/07/06/pilot.friendly.fire/.

54. Self-defense is an affirmative defense under the Uniform Code of Justice. Rule for Courts-Martial (R.C.M.) 916(e), Manual for Courts Martial (2002). A similar rule applies in cases brought before the International Criminal Court (ICC). To prevail on a defense of self-defense before the ICC, the conduct must have been a "reasonable" response to an imminent and unlawful use of force. Rome Statute of the International Criminal Court, July 17, 1998, art. 31(1)(c), U.N. Doc. A/CONF.183/9, reprinted in 37 INTERNATIONAL LEGAL MATERIALS 999 (1998) (the United States is not a party). The Rome Statute also limits the defense of obedience to orders. Responsibility for crimes falling within the Rome Statute is excluded only if the person acting under a legal obligation to obey orders (1) did not know the order was unlawful, and (2) the order was not manifestly unlawful. Id. art. 33.


56. See Chairman, Joint Chiefs of Staff, Standing Rules of Engagement for U.S. Forces, CJCS Inst. 3121.01 (series). The SROE replaced what were known as the "Peacetime Rules of Engagement." Most of the 2000 version (CJCS Inst. 3121.01A) is classified, with the exception of Enclosure A, which sets out the SROE for self-defense [hereinafter CJCS 3121.01A]. Typically, ROE for joint operations are included in Appendix 8 (Rules of Engagement) to Annex C (Operations) of the applicable operation plan or operation order.

57. See CJCSI 3121.01A, supra note 56, Encl. A, ¶ 1(a) (SROE are applicable during "all military operations, contingencies, terrorist attacks, or prolonged conflicts outside the territorial jurisdiction of the United States"). An exception is made for US forces under the operational control of a multinational force. Id. ¶ 1(c).
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59. Id. at IV-17. See also William J. Fenrick, Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement, 18 CANADIAN YEARBOOK OF INTERNATIONAL LAW 113–45 (1980).
60. See Coast Guard MLEM, supra note 18, ¶ 4.E.1, which provides that Coast Guard units shall adhere to the SROE under the following conditions: (1) when the unit (wherever located and even if conducting a Coast Guard mission at the time) determines that it must take action in defense of itself or other US forces in the vicinity; (2) when the unit is under the tactical control of the DoD (for any purpose) when operating outside US territory (seaward of the 12 NM territorial sea); or (3) when engaged in national self-defense, as authorized by an authority designated in the SROE. The SROE authority to exercise “national self-defense” in the absence of express authorization does not currently extend to the Coast Guard. Id. at 4-3.
61. See Navy MIO Doctrine, supra note 16, ¶ 2.6.1. Naval doctrine acknowledges that the sanctioning body’s resolution prescribes the level of force authorized in conducting MIO. However, “the wording is often ambiguous.” Id. Accordingly, MIO units must also rely on national interpretations of the resolution and the ROE.
63. US forces operating under the OPCON or TACON of a multinational force commander follow the mission accomplishment ROE of the multinational force if authorized by the National Command Authorities; however, they always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent, just as they do when under Coast Guard OPCON or TACON. See CJCS Inst. 3121.01A, supra note 56, Encl. A, ¶¶ 1.c & 1.f.
64. See Navy MIO Doctrine, supra note 16, ¶¶ 2.4 & 2.5.
66. Mike Spence, Lessons for Combined Rules of Engagement, U.S. NAVAL INSTITUTE PROCEEDINGS, Oct. 2000, at 56–60 (observing that dealing with ROE is difficult enough when only one nation’s armed forces are engaged; however, problems multiply rapidly when consistent ROE must be developed for multinational forces).
67. It is the policy of the United States that the armed forces of the United States will comply with the "law of war" during all armed conflicts, however, such conflicts may be characterized. The "law of war" encompasses all international law for the conduct of hostilities that is binding on the United States or its individual citizens. See Secretary of Defense, DOD Directive 5100.77, DoD Law of War Program, Dec. 9, 1998; Chairman, Joint Chiefs of Staff, Implementation of the DOD Law of War Program, CJCS Instruction 5810.01B, Mar. 25, 2002.
68. See Navy MOOTW Doctrine, supra note 16, at 3-2.
69. For the obligation, see Article 0914 of the US Navy Regulations (1990):

On occasions when injury to the United States or to citizens thereof is committed or threatened in violation of the principles of international law or in violation of rights existing under a treaty or other international agreement, the senior officer present . . . shall take such action as is demanded by the gravity of the situation. In time of peace, action involving the use of force shall be taken only in consonance with the provisions of [Article 0915].

Article 0915 limits the use of force against another State to cases of self-defense against hostile acts or hostile intent directed against the unit and, when appropriate, in defense of US citizens, their property and US commercial assets in the vicinity.
71. CJCSI 3121.01A, supra note 56, Encl. A, at ¶ 5.f.
72. Id. Encl. A, at ¶ 8(2).
74. See Secretary of Defense Directive of 16 May 2003; Chief of Naval Operations message 311903Z July 2003. DoD considers warning shots a signal to an approaching vessel to stop; they do not constitute a use of force.
77. Joint Doctrine for Homeland Security, supra note 58, at I-13 to I-15. Navy civil support missions include measures to combat terrorism, counter-narcotics operations, national security special events, critical infrastructure and key asset protection, support for natural and manmade disasters response operations and for chemical, biological, radiological, nuclear and high yield explosive (CBRNE) consequence management.
78. CJCSI 3121.01A, supra note 56, Encl. A, ¶ 1(i). The Naval Doctrine for Military Operations Other-Than-War distinguishes MOOTW involving the use/threat of force (combat) from MOOTW not involving the use/threat of force (noncombat). See Navy MOOTW Doctrine, supra note 16, at 1-2. Such operations often overlap with what are now referred to as Security and Stability Operations (SASO). MIO and counter-proliferation measures are categorized as MOOTW. Id. at 1-3 & ¶ 3.2.2.
79. Id. at IV-17 to IV-18.
81. Id. at IV-18. The applicable instruction is CJCSI 3121.02A, May 31, 2000. The instruction does not apply to US military units or personnel while under OPCON or TACON of the Coast Guard in support of counter-narcotics operations. Such units instead follow the SROE or CGUFP. See CJCSI 3121.02A, supra note 56, ¶¶ 3.c & 3.e.
83. The amended version is reproduced (in redline format) in Appendix III of this article.
84. Coast Guard MLEM, supra note 18, at 1-6. Portions of the MLEM are not releasable to foreign governments. Id. Chapter 4 is titled “Use of Force Policy and the Standing Rules of Engagement.” Additional guidance is contained in the U.S. Coast Guard, Maritime Counter Drug and Alien Migrant Interdiction Operations (AMIO), COMDINST M16247.4/NWP 3-07.4 (2000).
85. “Operational control” is the authority to direct all aspects of military operations and training necessary to accomplish the mission. “Tactical control” is mission-specific or task-specific. It is defined as the command authority over assigned or attached units made available for tasking that is limited to the detailed direction and control of movement or maneuvers.
within the operational area necessary to accomplish the missions or tasks assigned. Operational control includes tactical control. See DoD Dictionary, supra note 30.
86. Coast Guard MLEM, supra note 18, ¶ 3.C.1.a.1.
87. Id. ¶ 4.B.1.a.
88. 14 U.S.C.A. § 637(c) (West 2005). By the terms of the statute, it applies to naval surface vessels (or aircraft) on which one or more members of the Coast Guard are assigned pursuant to 10 U.S.C. § 379.
89. Coast Guard MLEM, supra note 18, at ¶ E.2.
90. Id. ¶ 4.B.3.b. See also MODEL PENAL CODE § 3.11(2) (1985) [hereinafter MPC]. The Model Penal Code serves as a template for defining the elements of crimes and defenses for many jurisdictions and sets out several defenses to what would otherwise be crimes involving the use of force. The Code is not legally binding.
91. Coast Guard MLEM, supra note 18, at 4-4.
92. The CGUFP does not distinguish between “opposed” boardings and “noncompliant” boardings. See Coast Guard MLEM, supra note 18, ¶ 4.A.3.
93. See id. ¶ 4.B.3.b.5.
94. The CGUFP prohibits warning shots other than against noncompliant vessels. Id. ¶ 4.B.2.d.
95. Id. at 4-14. Note that disabling fire is permitted even when there is a risk of “minimum” injury, but it will be discontinued if there is a “substantial” risk of injury. As phrased, the “substantiality” qualification apparently refers to the probability of risk, not its magnitude.
96. Note that the statute provides for an indemnity, not immunity. The indemnity also extends to those acting under that commanding officer’s direction for any penalties or actions for damages arising out of the action. 14 U.S.C.A. § 637(b) (West 2005).
97. See, e.g., The I’m Alone Arbitration (Can. v. U.S.), 3 UNITED NATIONS REPORTS OF INTERNATIONAL ARBITRAL AWARDS 1609 (1933) (use of disabling fire); Ford v. United States, 272 U.S. 593 (1924) (warning shots); United States v. 63 Kegs of Malt, 27 F.2d 741 (2d Cir. 1928) (warning shots); The Vinces, 20 F.2d 164 (E.D.S.C. 1927) (warning shots and disabling fire).
99. See U.S. Coast Guard, Operation New Frontier Procedures Manual, COMDTINST M3120.2 (2003) (public access is restricted because the manual is designated for official use only).
100. See RESTATEMENT, supra note 20, § 721, comment c & note 2.
101. In United States v. Hensel, 699 F.2d 18 (1st Cir. 1983), the court construed 14 U.S.C. § 89 and its legislative history and concluded that Congress did not intend that the statute would authorize the Coast Guard to conduct searches that would violate international law. Id. at 27.
102. See United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (holding that Fourth Amendment was not violated when customs officers boarded a US vessel, pursuant to their authority under 19 U.S.C. § 1581(a) to go on board any vessel at any place in the United States and examine the vessel’s documents without any suspicion of wrongdoing); see also United States v. Flores-Montano, 542 U.S. 149 (2004) (holding that Fourth Amendment does not require Customs officer to have “reasonable suspicion” to conduct a non-destructive search of a vehicle’s fuel tank when vehicle crossed US border).
103. U.S. CONST. amend. IV.
104. U.S. CONST. amend. V.
105. The Constitutional safeguards apply to interceptions and boardings even when the boarding does not have a law enforcement purpose.
108. For example, a defendant charged with violating 18 U.S.C. § 111 (forcibly assaulting, resisting or impeding certain federal officers designated in 18 U.S.C. § 1114) might assert in defense that the defendant’s use of force against the officer was justified by the officer’s use of excessive force against the defendant. A person is not justified in resisting arrest by force on the ground that the arrest is unlawful. See MPC, supra note 90, § 3.04(2)(a)(i).
110. See Terry v. Ohio, 392 U.S. 1 (1968). But see United States v. Draper, 536 U.S. 194 (2002) (holding that, under the circumstances presented, the presence of three police officers on a bus that was stopped did not constitute a seizure of the persons on the bus).
111. Whenever a law enforcement officer has acted in a way that denies a person the freedom to walk away, a Fourth Amendment “seizure” has occurred. Terry, 392 U.S. at 16. The reasonableness of the officer’s suspicion is determined by a “totality of the circumstances” test. United States v. Arvizu, 534 U.S. 266 (2002). The Fifth Circuit has held that the “reasonable grounds” standard applicable to a right of approach boarding (under Article 110 of the 1982 LOS Convention) satisfies the “reasonableness” test under the Fourth Amendment. See United States v. Williams, 617 F.2d 1063, 1083 (5th Cir. 1980) (applying Article 22 of the former 1958 Convention on the High Seas).
113. Tennessee v. Garner, 417 U.S. 1, 7–12 (1985) (holding that the use of deadly force to stop a fleeing suspect is only reasonable if the officer has probable cause to believe that the suspect poses a significant threat of death or physical injury to the officer or others). See also MPC, supra note 90, § 3.07(b).
115. Id. at 397.
116. Id. at 396.
117. Id.
119. United States v. Verdugo-Urquidez, 494 U.S. 259, 274–75 (1990); see also Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (confirming it is “well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders”). Some treaties of friendship, commerce and navigation (FCN) extend “national treatment” to nationals of the other State. Such treaties have been held to be self-executing. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (holding that the FCN treaty between the United States and Japan “operates of itself without the aid of any legislation”).
120. United States v. Peterson, 812 F.2d 486, 491 (9th Cir. 1987) (holding that a foreign search is reasonable if it conforms to the requirements of foreign law). But see United States v. Bin Laden, 132 F. Supp.2d 168, 186–87 (S.D.N.Y. 2001) (holding that Fifth Amendment protections relating to self-incrimination apply to the use, in a US court, of a statement obtained in a foreign custodial interrogation by US government agents because the Fifth Amendment “violation” occurs when the statement is used at trial, not when it was obtained).
121. See Restatement, supra note 20, § 722, comment m & note 16. In Rasul v. Bush, 542 U.S. 466 (2004), the Court held that the Guantanamo Bay Navy Base in Cuba, over which the United States exercises “complete jurisdiction and control” under the lease, falls within the territorial
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jurisdiction of the United States for purposes of applying the habeas corpus statute, 28 U.S.C. § 2241. Accordingly, a federal court with venue may determine whether the detainees are being held in custody in violation of the Constitution or the laws or treaties of the United States. The Supreme Court’s holding so far does not extend to detentions at other overseas locations that are not under the “plenary and exclusive jurisdiction” of the United States.

122. United States v. Toscanino, 500 F.2d 267, 274–75 (2d Cir. 1974). In Ker v. Illinois, 119 U.S. 436 (1886), however, the Court held that a defendant who was forcibly abducted in Peru for trial in the U.S. was not entitled to have the charges dismissed on grounds that his right to due process was violated. See also Frisbie v. Collins, 342 U.S. 519 (1952); RESTATEMENT, supra note 20, § 433.

123. Acting under Article 41 of the Charter, the Council cannot authorize “armed force.” Armed force may only be authorized under Article 42. For some, that raises the question whether police force can be used to enforce council resolutions adopted under Article 41; however, the Security Council appears to have answered the question in the affirmative in its embargo resolutions against the former Rhodesia. See Soons, supra note 43, at 321.


125. LOS Convention, supra note 14, art. 88.

126. Id. art. 301.


128. Britain’s seizure of US merchant vessels was a principal cause of the War of 1812. Similarly, President Wilson sought a declaration of war after German submarines sank US merchant vessels at a time when the United States had declared its neutrality in World War I. Today, however, any response must be consistent with Articles 2(4) and 51 of the UN Charter, as construed by the International Court of Justice in the Military and Paramilitary Activities in and against Nicaragua decision and the Oil Platforms case. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (merits), reprinted in 25 INTERNATIONAL LEGAL MATERIALS 1023 (1986); Oil Platforms (Iran v. U.S.), 2003 I.C.J. ___ (Nov. 6) (merits), available at http://www.icj-cij.org/icjwww/idocket/lop/lopframe.htm. See also William H. Taft IV, Self-Defense and the Oil Platforms Decision, 29 YALE JOURNAL OF INTERNATIONAL LAW 295 (2004) (criticizing the court for its excursion into obiter dictum and criticizing the court’s treatment of the armed attack and self-defense issues). Under the General Assembly definition, an “attack by the armed forces of a State on the land, sea or air forces, or marine or air fleets of another State” constitutes aggression. Aggression Resolution, supra note 127, art. 3(d). The definition appears to be limited to attacks on warships and naval auxiliaries. However, in its dispute with Canada over Canada’s seizure of the F/V Estai on the high seas in 1995, Spain argued that Canada’s use of warning shots to stop the vessel constituted a use of force in violation of Article 2(4) of the Charter. Fisheries Jurisdiction (Sp. v. Can.), 1998 I.C.J. 432, 465 (Dec. 4) (declining jurisdiction). See also D. P. O’CONNELL, II, THE INTERNATIONAL LAW OF THE SEA 804 (Ivan A. Shearer ed., 1984). However, nothing in the decision by the International Court of Justice in that case or by the International Tribunal on the Law of the Sea in the M/V Saiga case discussed below suggests that either tribunal considered the use of military weapons in stopping and boarding a

When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

134. See United States v. Postal, 589 F.2d 862, 870 (5th Cir.) ("the boarding of a vessel on the high seas by its flag state is not an international event. The consequences are solely a domestic matter. The boarding of a foreign vessel is, of course, a matter of international concern that might call for more restraint on the part of the boarding state."), cert. denied, 442 U.S. 832 (1979).


136. See ICCPR, supra note 135, art. 2(1) (requiring States-parties to protect the defined rights of all individuals "within its territory and subject to its jurisdiction"); see also RESTATMENT, supra
note 20, § 701. Application might turn on reservations and exceptions entered and the extent to which the convention is deemed to be self-executing.

137. See, e.g., United States-Liberia WMD Boarding Agreement, supra note 6, art. 4(5) & art. 9. 2005 Protocol to the SUA Convention, supra note 133, art. 8bis, para. 7.

139. It is beyond the scope of this article whether an individual would have standing in a US court to object to enforcement actions by the United States that went beyond or were in contravention of an applicable bilateral boarding agreement with the flag State.

140. The diplomatic correspondence, claims and briefs exchanged between the two governments are reprinted in DEPARTMENT OF STATE, ARBITRATION SERIES NO. 2 (vol. 1–7), I’m Alone Case (1931–1935) [hereinafter I’m Alone Case]. The interim decision is also reported in the “I’m Alone” Arbitration (Can. v. U.S.).

141. Convention for the Prevention of Smuggling of Intoxicating Liquors (United States–Great Britain), Jan. 23, 1924, reprinted in I’m Alone Case, supra note 140, vol. 1, annex B. Article II of the Convention provided the US jurisdiction to board British vessels beyond US waters when within a distance from the coast the target vessel could traverse in one hour. Article IV provided for arbitration of disputes.

142. Under customary law, by acting as a “mothership” supplying contraband to contact boats in violation of US laws, the I’m Alone might be said to be “constructively present” in US waters. The constructive presence doctrine is implicit in Article 111 of the 1982 LOS Convention and Article 23 of the 1958 Convention on the High Seas, both of which in describing the right of hot pursuit recognize that pursuit may be commenced if the pursued vessel "or one of its boats" is in the pursuing State’s territorial sea or internal waters. See also MYRES S. MCDOUgal & WILLIAM T. BURKE, PUBLIC ORDER OF THE OCEANS 909–11 (1962, rev. 1987). Under the narrow view of the doctrine, a vessel is only constructively present when it works with its own boats to violate coastal State law. Under the broader view, the contact boats used to shuttle the illicit cargo to shore need not be from the mothership. See ROBIN R. CHURCHILL & A. VAUGHAN LOWE, THE LAW OF THE SEA 215–16 (3d ed. 1999).

143. Joint Interim Report of the Commissioners, the I’m Alone Case (1933), supra note 140, vol. 6, at 5.

144. Id. Initially, the Commission concluded only that the intentional sinking was not justified by any provision of the 1924 treaty. Later, in their final report, they added that the sinking was not justified "by any principle of international law." Ultimately, compensation was denied to the owners on the ground that they were US nationals, but the arbitrators ordered the United States to apologize and pay $25,000 in compensation to the United Kingdom for its insult to the UK flag. Joint Final Report of the Commissioners, the I’m Alone Case (1935), supra note 140, vol. 7, at 3–4.

145. Part V of the LOS Convention, which governs enforcement of marine resource laws in the EEZ, similarly limits “enforcement measures” available to the coastal State to those “necessary”; but it appears to take a broad view of necessity. Article 73 provides that the coastal State is authorized to “take such measures, including boarding, inspection and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted in conformity with this Convention.” LOS Convention, supra note 14, art. 73 (emphasis added). This is functionally equivalent to the standard in 14 U.S.C. § 89 (“All necessary force to compel compliance”). Spain took a narrower view of Article 73 in its dispute with Canada over the 1995 seizure of the F/V Estai. Spain’s counsel suggested in oral argument that because Article 73 does not expressly authorize the use of force, any use of force would violate international law. Fisheries Jurisdiction (Sp. v. Can.) (Oral argument for Spain by Counsel Sanchez on June 9, 1998), at http://www.icj-cij.org/icjwww/idocket/iecframe.htm.

147. Id. at 499 (emphasis added).

148. The use of the phrase “proved necessity” suggests that the burden of proof was on Denmark.

149. This conclusion may mean nothing more than that if the fleeing vessel’s flag State intervenes and persuades the vessel to stop, the use of force is no longer necessary. Had the British intervention permitted Red Crusader to escape, it is not clear the British intervention would have been excused.

150. Id. at 500.

151. Id.


153. Prompt release actions may be brought under Article 292 of the LOS Convention to obtain the release of a vessel and crew upon payment of reasonable security.

154. The M/V Saiga, supra note 152, ¶ 153.

155. Id. ¶ 155.

156. Id. ¶ 153.

157. Straddling Fish Stocks Agreement, supra note 131, art. 22.

158. Id. art. 22(1)(f). Before extending the Article 22 limits outside the fisheries enforcement context it might be useful to consider that some fisheries enforcement regimes do not even permit boarding officers to be armed while conducting boardings, See, e.g., Northwest Atlantic Fisheries Organization (NAFO), Conservation and Enforcement Measures, art. 24(8), NAFO Doc. 04/1 Serial No. N4936, available at http://www.nafo.ca/activities/FRAMES/ AcFrFish.html. Unarmed boardings would be unrealistic for vessels that might be engaged in trafficking in narcotics, weapons or humans, and any use of force policy must recognize the differing risk levels presented in the various contexts.

159. The M/V Saiga, supra note 152, ¶ 156.

160. See Tim Zimmermann, If World War III Comes, Blame Fish, U.S. NEWS & WORLD REPORT, Oct. 21, 1996, at 59–60. The article reports that “fish are the reason that Russians are shooting at Japanese, Tunisians are shooting at Italians, and a lot of people are shooting at Spaniards.” It goes on to report that three Thai fishermen were shot dead by Vietnamese maritime authorities, two Spaniards were injured by gunfire from a Portuguese patrol boat, Iceland authorized the use of force to exclude Danish fishermen from its waters, and a Malaysian naval vessel fired on a Thai fishing boat, killing the master and his 14-year-old son. The United Kingdom dispatched naval frigates to protect British fishing boats during the several “cod wars” with Iceland from 1958 to 1976. See also O’Connell, supra note 128, at 1071–72 n.67 (collecting cases and protests involving the use of force against US vessels and those of other States).

161. The use of force to intentionally sink a vessel with persons aboard would constitute “deadly force” (force that is likely to cause death or serious physical injury). The standards for the use of deadly force are much more stringent than those applicable to stopping a noncompliant vessel.

162. Recent decisions by the International Court of Justice highlight the importance of clarifying the burden and quantum of proof in such cases. See Oil Platforms, supra note 128 (Higgins, J. Separate Opinion, ¶¶ 30–39), reprinted in 42 INTERNATIONAL LEGAL MATERIALS 1334 (2003). In the S.S. Lotus case, the tribunal ruled that France, as the State challenging Turkey’s exercise of jurisdiction, had the burden of proving that Turkey’s action violated an applicable rule of international law. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).
163. The LOS Convention prescribes an effectiveness standard for enforcement. See, e.g., LOS Convention, supra note 14, art. 94(1) (establishing flag State’s duty to “effectively” exercise its jurisdiction and control). For example, in 1964, the United States protested an incident that occurred 16 miles off the Soviet coast in which a Soviet vessel fired on the unarmed American merchant vessel Sister Katingo, apparently because the American vessel failed to clear customs before departing the Soviet port. The United States also protested a 1969 incident in which a Peruvian gunboat fired on an unarmed US tuna boat located 40 miles off the Peruvian coast, breaking the tuna boat’s mast and radio antenna. The United States argued there was no justification under international law for firing on an unarmed fishing vessel. See O’CONNELL, supra note 128, at 1071-72 n.67.

165. CHURCHILL & LOWE, supra note 142, at 461; see also O’CONNELL, supra note 128, at 1071-74 (also relying on the I’m Alone case).

166. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, U.N. Doc. E/CN.15/1996/16/Add.2 [hereinafter Basic Principles]. The Basic Principles declare themselves to be non-derogable, even in times of public emergency. Id. para. 8. Although the Basic Principles developed by the UN Economic and Social Council are not legally binding, the European Court of Human Rights treats them as if they were. See, e.g., Ocalan v Turkey [2003] Eur. Ct. H.R. 46221/99, ¶ 196.


168. Basic Principles, supra note 166, para. 2. The European Court of Human Rights held that the Government of Turkey bore responsibility for failing to equip its security forces with non-lethal force equipment when they responded to a large internal civil disturbance, leaving the forces no alternative to the use of deadly force. Güleç v Turkey, [1998] Eur. Ct. H.R. 21593/93, ¶¶ 71, 73, 83.

169. As noted above, under Articles 297 and 298 of the LOS Convention certain disputes concerning law enforcement or military activities may be exempt from the Convention’s compulsory dispute settlement procedures. See LOS Convention, supra note 14, arts. 297 & 298. Private suits for damages may be subject to the defenses of sovereign immunity or the act of State doctrine. See, e.g., Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (dismissing suit by tanker owner for damage to vessel by Argentine naval gunfire). The act of State doctrine applies only to the State’s acts within its territory, not to those occurring on the high seas.

170. See LOS Convention, supra note 14, arts. 95 & 96.

171. Navy MIO Doctrine, supra note 16, ¶¶ 2.4 & 2.5.

172. See, e.g., HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 180 n.89 (Richard H. Dana ed, 8th ed. 1866) (George G. Wilson rev. ed. 1936) (the “right to stop a foreign vessel and visit her must carry the right to use the requisite force, if the exercise of the right is resisted. If not, it is not a right in any sense worth disputing”).


174. For example, a WMD shipment to a suspected terrorist organization being transported by sea in the Persian Gulf area might implicate one or more resolutions on WMD proliferation, global terrorism and State-specific embargoes.


176. Id. art. 25. The means by which a decision of the Council is to be “carried out” are not defined; however, they must be “in accordance with” the Charter, including the purposes and principles articulated in Articles 1 and 2.
177. Such boarding agreements are *lex specialis* and therefore control in any disputes between the parties. However, such agreements must be compatible with the LOS Convention. See LOS Convention, supra note 14, art. 293(1).


179. The “M/V Saiga,” *supra* note 152, ¶ 156.

180. See United States-Liberia Bilateral WMD Boarding Agreement, *supra* note 6, art. 4(5).

181. The boarding agreement expressly preserves the right of the parties to exercise the right of approach and visit under international law. See *id.* art. 4(4).


183. Id. art. XVII.

184. See *id.* art. 1(6)(a). The Panama Agreement permits WMD boardings by “auxiliary personnel” only when law enforcement personnel are not available. See United States-Panama Bilateral WMD Boarding Agreement, *supra* note 6, art. 1, para. 4 (revising Article XV of the existing agreement).


187. The identification need not include the enforcing vessel’s name. The vessel’s (or aircraft’s) nationality and status as a warship is sufficient.

188. The “M/V Saiga,” *supra* note 152, ¶ 156.

189. Article 9 of the WMD boarding agreements between the United States, Liberia and the Marshall Islands incorporates a requirement for visual and auditory signals.

190. The Tribunal ultimately concluded, on conflicting assertions, that Guinea had failed to warn the *Saiga* before opening fire. The “M/V Saiga,” *supra* note 152, ¶ 157. If warnings were given, P35 did not document the warnings by audiotape or videotape. The Tribunal did not identify which of the States had the burden of proof on the question whether warnings were given.

191. There is no requirement to identify the vessel by name. US Coast Guard cutters and boats often display the rotating blue light associated with law enforcement vehicles. The light is expressly authorized only in Inland Waters. See 33 C.F.R. § 88.11 (2005).

192. The International Code of Signals consists of alphanumerically coded signals that may be transmitted between vessels by radio, signal flags, semaphore or flashing light. The meaning of each signal is set forth in a readily available publication printed in several languages. See NIMA Publication 102, *supra* note 185.

193. Coast Guard MLEM, *supra* note 18, ¶ 4.3 & Table 4-1.

194. Navy MIO Doctrine, *supra* note 16, ¶ 6.6. Any decision to use “full force,” which might include sinking the vessel, must be evaluated not only under the applicable mission accomplishment ROE but also governing international law standards, such as those set by the *I’m Alone* case.

Limits on the Use of Force

196. In Lewin v. United States, the court of appeals rejected the defendant’s claim that because the Coast Guard had failed to fire warning shots before firing into his vessel, unintentionally killing another crewman, the defendant was justified in resisting the boarding with “force.” Although the court concluded that the former statutory requirement to fire warning shots should be “rigidly administered” for the good of the service,” it also concluded that it was “perfectly clear that the defendant knew his boat was being chased.” Lewin v. United States, 62 F.2d 619, 620 (1st Cir. 1933).

197. See Coast Guard MLEM, supra note 18, ¶ 4.D & Table 4-1.


200. Id. at 419.

201. Id. at 424. The court quoted its earlier decision in United States v. Gomez:

A law enforcement officer who has duly announced his authority and who has attempted to stop and question a suspect is not required “to simply shrug his shoulders,” … and abandon his investigation… [T]he officer has the right to detain the suspect against his will… Indeed, the officer ”is entitled to make a forcible stop.” 633 F.2d 999, 1006 (2d Cir. 1980) (emphasis added), cert. denied, 450 U.S. 994 (1981).


203. NIMA Publication 102, supra note 185, at 83.

204. The port State control regime is a response to the ineffectiveness of a regime that relies solely on flag State jurisdiction and control.


206. McDougal, supra note 20, at 557–58. Professor McDougal distinguished the use of force in law enforcement measures against private actors from forcible self-help and self-defense measures against States for violations of international law. He goes on to report “I’m ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that was a very grave mistake.” Id. at 559. Colombos devoted a chapter to “forcible measures short of war used in time of peace.” C. JOHN COLOMBO, INTERNATIONAL LAW OF THE SEA ch. X (6th ed. 1967).


211. United States v. Del Prado-Montero, 740 F.2d 113, 116 (1st Cir.), cert. denied, 469 U.S. 1021 (1984). The court also rejected a defense argument that the Navy’s participation violated the Posse Comitatus Act, 18 U.S.C. § 1385, citing the former regulation authorizing Navy support for Coast Guard counter-narcotics operations in 32 C.F.R. § 213.10(c) [repealed]. See 740 F.2d at 116.

212. The United States has adopted an escalating use of force approach that progresses from warning shots to disabling fire. Other States do not necessarily follow that order. For example, when a marijuana smuggling vessel failed to heed their warning shots, a Canadian enforcement
vessel fired two 12-gauge shotgun blasts into the vessel’s pilothouse, where three or four of the crewmembers were located. No one was injured and the operator then stopped the boat. See United States v. Hensel, 699 F.2d 18, 22 (1st Cir.), cert. denied, 461 U.S. 958 (1983).

213. The CGUFP includes limited provisions for non-lethal “higher-level” force tactics to overcome a vessel operator’s refusal to comply with a boarding demand. The tactics seek to obviate resort to the more dangerous disabling fire alternative. The two non-lethal force means presently authorized include string-ball projectiles and rubber fin-stabilized munitions. Each is fired at the operator of the vessel from a 12-gauge shotgun, with the intent of disabling the operator long enough to allow the boarding party to get aboard. See Coast Guard MLEM, supra note 18, ¶4.D.3.c. & Table 4-1. Neither of the techniques is likely to be effective against the size of vessel likely to be engaged in transporting WMD or missile delivery systems.


215. See 72 Tons of Marijuana Seized, NEW YORK TIMES, July 7, 1988. See also United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) (Coast Guard’s use of machine-gun and deck gun fire to stop foreign-flag marijuana smuggling vessel 200 miles off Florida coast).

216. See U.S. DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1989–1990, at 452–56 (2003). Before resorting to disabling fire, the cutter signaled the fleeing vessel, sprayed water across the vessel’s bow and down its stack and fired warning shots across its bow.

217. The doctrine for use of helicopters by special operations forces is classified and will not be discussed here. See Navy MJO Doctrine, supra note 16, ¶ 7.3.2.1.


219. Although Cambodia could not verify the vessel’s registration, it granted conditional consent to the boarding if the vessel was in fact registered in Cambodia.

220. See LOS Convention, supra note 14, art. 110. See also Convention on the High Seas, Apr. 29, 1958, art. 22, 13 U.S.T. 2312, 450 U.N.T.S.

221. In exercising a right of visit boarding, the enforcing vessel is no longer limited to sending boarding teams over by small boat. In contrast to Article 22 of the 1958 Convention on the High Seas, which spoke only of sending a boarding team by boat, Article 110 of the 1982 LOS Convention expressly extends the right of visit to military aircraft and any other duly authorized ships or aircraft clearly marked and identifiable as being on government service. See LOS Convention, supra note 14, art. 110.


223. See, e.g., United States v. Juda, 46 F.3d 961, 969 (9th Cir.) (holding that the Coast Guard was entitled to proceed to verify the ship’s right to fly its flag by examining its documents and, if necessary, by an examination on board the ship; where the master refused and threatened to shoot at the Coast Guard boat “the Coast Guard was authorized to seize” the vessel), cert. denied, 514 U.S. 1090 (1995); United States v. Kahn, 35 F.3d, 426, 430 (9th Cir. 1994) (holding that the Coast Guard may legally detain a vessel while awaiting consent of the flag State to exercise jurisdiction over the vessel).

224. If evidence of criminal activity is discovered, the officials from the State conducting the boarding generally have two options: prosecute the individuals for violating the laws of the boarding State, or—in some circumstances—detain the individuals until they can be delivered to officials of another State with jurisdiction over the offense. As Chief Justice Marshall declared in 1825, “the Courts of no country execute the penal laws of another.” The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825).
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225. The missiles reportedly had a designed range of roughly 300 kilometers. The Missile Technology Control Regime (MTCR) defines Category I missiles (the most regulated class) as those capable of delivering at least a 500 kilogram payload to a range of at least 300 kilometers. See Missile Technology Control Regime, Equipment, Software and Technology Annex, Apr. 7, 2004, p. 10, at http://www.mtcr.info/english/Annex2004.doc.


228. See generally M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).


230. See supra note 145 and accompanying text.

231. MPC, supra note 90, § 3.07.

232. See supra note 113 and accompanying text.

233. Coast Guard MLEM, supra note 18, ¶ 4.B.3.b.2. The MLEM also limits the use of deadly force to situations in which the suspect has failed to obey an order to halt, where such orders are feasible and their use would not increase the danger to the officer or others. Id.

234. Id. ¶ 4.B.3.b.4.

235. See CJSI 3121.01A, supra note 56, Encl. A, ¶ 5; see also Coast Guard MLEM, supra note 18, ¶ 4.A.5.

236. Coast Guard MLEM, supra note 18, ¶ J.3. See also U.S. Coast Guard, Maritime Counter Drug and Alien Migrant Interdiction Operations, ¶ 7.15, COMDTINST M16247.4/NWP 3-07.4 (2000).

237. See CJSI 3121.01A, supra note 56, Encl. A, ¶ 5.a; see also Coast Guard MLEM, supra note 18, ¶ 4.A.5, 4.B.2 & App. J.3.

238. See CJSI 3121.01A, supra note 56, at A-4 to A-5. The meaning of military necessity under the law of armed conflict is beyond the scope of this article. See generally ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK OF THE LAW OF NAVAL OPERATIONS 292 n.6 (A.R. Thomas & James C. Duncan, eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED Supplement].

239. See CJSI 3121.01A, supra note 56, at A-4 to A-6. The meaning of proportionality under the law of armed conflict is beyond the scope of this article. See ANNOTATED SUPPLEMENT, supra note 238, at 294 n.7.


242. See id. Encl. A, ¶ 7. See also Coast Guard MLEM, supra note 18, ¶ 4.A.5 (note).


244. Id.

245. Id. at 50.

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248. See CJCSTI 3121.01A, supra note 56, Encl. A, ¶ 8.a(1).
249. Australian fisheries enforcement vessels patrolling the Southern Ocean may be the exception. Australia has repeatedly demonstrated its commitment to effective enforcement of marine resource conservation laws through some of the longest “hot pursuits” of scowfaw vessels in history. See Erik Jaap Molenaar, Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa I and the South Tomi, 19 International Journal of Marine and Coastal Law 19 (2004) (reporting Australia’s 21-day, 3,900 mile pursuit of F/V Viarsa I and 14-day, 3,300 mile pursuit of F/V South Tomi).
250. See RESTATEMENT, supra note 20, §§ 432–433; United States v. Conroy, 589 F.2d 1258, 1267–68 (5th Cir. 1979) (upholding Coast Guard enforcement action in Haitian territorial sea with Haiti’s consent).