
INTERNATIONAL LAW STUDIES

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The Peacetime Right of Approach and Visit and Effective Security Council Sanctions Enforcement at Sea

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95 INT'L L. STUD. 400 (2019)

Volume 95



2019

Published by the Stockton Center for International Law

ISSN 2375-2831

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

I. INTRODUCTION

With the addition of Resolution 2464 on April 10, 2019, the U.N. Security Council has now adopted ten major resolutions imposing sanctions on the Peoples' Democratic Republic of Korea (DPRK or North Korea), following that State's test of a nuclear device on October 9, 2006.¹ The sanctions target the import or export of weapons and a wide variety of products and services.² The United Nations monitors compliance of the DPRK sanctions through the 1718 Committee, established by Security Council Resolution 1718 in 2006,³ and a Panel of Experts, established by Resolution 1874 in 2009.⁴ Although Russia and China publicly support the goal of denuclearizing the Korean Peninsula, whether they will continue to support the U.N. sanctions regime at its peak 2017 level is subject to doubt.⁵

So far, the resolutions limit enforcement boardings to those consistent with existing international law,⁶ including the U.N. Convention on the Law of the Sea.⁷ For example, the "Maritime Interdiction of Cargo Vessels" section of Resolution 2397 limits enforcement by non-flag States to vessels in

1. Beginning with Resolution 1718 in 2006, all ten resolutions were adopted unanimously by the Council. The United States is the "penholder" for Security Council sanctions against the DPRK. The resolutions condemn North Korea's nuclear and ballistic missile activity. A number of States have also imposed sanctions under their domestic law. The United States enforces the sanctions regime domestically through the North Korea Sanctions and Policy Enhancement Act of 2016, 22 U.S.C. § 9201 (2012 Supp.), which was recently invoked in forfeiture proceedings against the M/V *Wise Honest*.

2. See, e.g., S.C. Res. 1718, ¶¶ 8–9 (Oct. 14, 2006); Fact Sheet on the 1718 DPRK Sanctions Committee (2006), SECURITY COUNCIL REPORT, <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/dprk-north-korea-sanctions-fact-sheet.pdf>.

3. S.C. Res. 1718, *supra* note 2; Fact Sheet on the 1718 DPRK Sanctions Committee, *supra* note 2.

4. S.C. Res. 1874, ¶ 26 (June 12, 2009).

5. Similarly, whether the United States is willing to impose effective secondary sanctions on Russian and Chinese entities that support illicit trade with the DPRK is also subject to doubt.

6. S.C. Res. 1718, *supra* note 2, ¶ 8(f); see generally Robin R. Churchill, *Conflicts between United Nations Security Council Resolutions and the 1982 United Nations Convention on the Law of the Sea, and Their Possible Resolution*, 84 INTERNATIONAL LAW STUDIES 143 (2008).

7. S.C. Res. 1874, *supra* note 4, ¶¶ 11–12 (limiting high seas boardings to those based on flag State consent). State enforcement under Resolution 1540, which targets proliferation by non-State actors, is similarly limited. See S.C. Res. 1540 (Apr. 28, 2004). China agreed to support Resolution 1540 only after a provision for interdiction at sea was removed. As the

the enforcing State's ports or territorial sea.⁸ China (PRC) and Russia reportedly blocked a U.S. proposal to include in Resolution 2397 authority to board vessels suspected of violating the sanctions while on the high seas.⁹ The failure to include that authority is reflected in the resolutions cited in this article, none of which authorize non-flag States to board a foreign vessel on the high seas to determine if that vessel is in violation of a Security Council resolution.

To circumvent the Security Council sanctions, the DPRK and its State and non-State enablers providing shipping, commodity, banking, and marine insurance services employ a variety of measures. Some are borrowed from drug traffickers (employment of stateless vessels or vessels of doubtful or uncooperative registries) and illegal, unreported, and unregulated fishing operators (silencing the vessel's automatic identification system to avoid detection and engaging in high seas ship-to-ship transfers of illicit cargo).¹⁰ The United States has accused Russia of violating the sanctions placed on the DPRK by engaging in the illicit trade of petroleum products through ship-to-ship transfers.¹¹ Multinational patrol forces have also documented PRC-

Chinese Ambassador to the United Nations, Wang Guangya, stated, "That nasty word, interdiction, has been taken out." See *NAPSNet Daily Report 22 March, 2004*, NAUTILUS INSTITUTE FOR SECURITY AND SUSTAINABILITY ¶ 10 (Mar. 22, 2004), <https://nautilus.org/napsnet/napsnet-daily-report/napsnet-daily-report-22-march-2004/>; see also Warren Hoge, *Ban on Weapons of Doom Is Extended to Qaeda-Style Groups*, NEW YORK TIMES (Apr. 29, 2004), <https://www.nytimes.com/2004/04/29/world/ban-on-weapons-of-doom-is-extended-to-qaeda-style-groups.html> ("China ended a threat to use its veto when language was dropped that had called for the interception of ships at sea suspected of carrying banned weapons.").

8. S.C. Res. 2397, ¶ 9 (Dec. 22, 2017).

9. Andrew C. Winner, *Interdicting North Korean Vessels: Another False Hope*, 38 NORTH (Oct. 4, 2017), <https://www.38north.org/2017/10/awinner100417/>.

10. See Michael R. Gordon, *North Korea Eludes Sanctions, Buying Oil and Selling Arms and Coal, U.N. Report Finds*, WALL STREET JOURNAL (Mar. 10, 2019), <https://www.wsj.com/articles/u-n-report-finds-north-korea-eluding-sanctions-11552269431> (citing U.N. Panel of Experts' report); Alastair Gale, *'We Got Them': A U.S. Destroyer Hunts for North Korean Oil Smugglers*, WALL STREET JOURNAL (Apr. 14, 2019), <https://www.wsj.com/articles/we-got-them-a-u-s-destroyer-hunts-for-north-korean-oil-smugglers-11555239601>; U.S. Dep't of State, U.S. Dep't of the Treasury & U.S. Coast Guard, *North Korean Sanctions Advisory: Updated Guidance on Addressing North Korea's Illicit Shipping Practices* (Mar. 21, 2019), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/dprk_vessel_advisory_03212019.pdf (describing DPRK's deceptive shipping practices).

11. Tensions between Russia and the United States were exacerbated over the 2018 midterm report of the Panel of Experts. The United States blocked the publication of the report in September 2018, claiming that Russia interfered in the work of the Panel, pressuring it to modify the report to conceal Russian violations of the sanctions regime. An abbreviated report covering all of 2018 was finally issued on December 31, 2018, but it did not

flagged or PRC-owned vessels engage in ship-to-ship transfers in the East China Sea to circumvent DPRK sanctions on oil imports.¹²

On January 11, 2018, seventeen Proliferation Security Initiative (PSI) participating States issued a joint statement on the need to increase efforts to fully implement Resolutions 2375¹³ and 2397¹⁴ aimed at stopping the development of North Korea's nuclear and ballistic missile programs.¹⁵ The signing States affirmed their belief that naval interdiction is a legitimate and necessary step to properly enforce U.N. sanctions against North Korea while recognizing that the existing resolutions do not authorize non-consensual boardings on the high seas. The declaration also recognized that the PSI Statement of Interdiction Principles provides an appropriate framework for enforcing the DPRK sanctions.¹⁶

This article opens by explaining the role of the U.N. Security Council in preserving international peace and security and detailing the nature of maritime security operations, including maritime interception operations (MIO), while also highlighting some of the operational and legal challenges faced by naval forces conducting such operations. It then traces the development of the right of approach and the right of visit from customary international law to the 1958 Geneva Convention on the High Seas and then the 1982 U.N. Convention on the Law of the Sea. Although naval forces presently rely on

mention the U.S.-Russian dispute. *See* Chair of the Security Council Committee established pursuant to resolution 1718 (2006), Letter dated December 31, 2018 from the Chair of the Security Council Committee established pursuant to resolution 1718 (2006) addressed to the President of the Security Council, U.N. DOC. S/2018/1148 (Dec. 31, 2018); *see also* CHIEF OF NAVAL OPERATIONS, A DESIGN FOR MAINTAINING MARITIME SUPERIORITY 2.0, at 3 (2018) (“China and Russia seek to accumulate power at America’s expense and may imperil the diplomatic, economic, and military bonds that link the United States to its allies and partners.”).

12. *See, e.g., North Korea Sanctions: Royal Navy Frigate Spots Illicit Fuel Transfer at Sea*, NAVALTODAY.COM (Apr. 8, 2019), <https://navaltoday.com/2019/04/08/north-korea-sanctions-royal-navy-frigate-spots-illicit-fuel-transfer-at-sea/>.

13. S.C. Res. 2375 (Sept. 11, 2017).

14. S.C. Res. 2397 (Dec. 22, 2017).

15. The signing States were Argentina, Australia, Canada, Denmark, France, Germany, Greece, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Singapore, South Korea, the United Kingdom, and the United States. *See* Media Note, Office of the Spokesperson, U.S. Department of State, Joint Statement from Proliferation Security Initiative (PSI) Partners in Support of United Nations Security Council Resolutions 2375 and 2397 Enforcement (Jan. 12, 2018), <https://www.state.gov/joint-statement-from-proliferation-security-initiative-psi-partners-in-support-of-united-nations-security-council-resolutions-2375-and-2397-enforcement/>.

16. *Id.*

Article 110 of the 1982 Convention to exercise the right of visit when there are reasonable grounds for believing the vessel is stateless, I conclude that the bases for exercising a right of visit cannot develop beyond the present text of Article 110, except by treaty or a Chapter VII decision by the Security Council.¹⁷ The text of Article 110 forecloses extensions by customary law, as some commentators have argued.¹⁸ Finally, the article concludes with a suggestion that the Security Council consider adding a limited right of visit to naval forces charged with enforcing its Chapter VII resolutions at sea. This limited right would authorize at-sea boardings when there are reasonable grounds for believing the vessel is engaged in activities that violate the sanctions imposed by the resolution, while at the same time providing a remedy in cases where the suspicions prove unfounded.

II. THE ROLE OF THE U.N. SECURITY COUNCIL

The U.N. Charter assigns the fifteen-member Security Council primary responsibility for the maintenance of international peace and security.¹⁹ The Council generally acts under the authority conferred by Chapter VI (peaceful settlement of disputes) or Chapter VII (actions in response to threats to the peace, breaches of the peace, and acts of aggression).²⁰ If it finds, pursuant to Article 39, that a situation threatens international peace or constitutes a breach of the peace or an act of aggression, the Council has the authority to, *inter alia*, impose an economic embargo (and interrupt rail, sea, and air communications) under its Article 41 authority.²¹ If, on the other hand, it finds

17. Of course, any treaty or international agreement providing a basis for boarding, including the 2005 SUA Protocol (*see infra* note 73) and the bilateral agreements concluded under the PSI, will only bind the parties. The United States has entered into PSI boarding agreements with the governments of Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia, Panama, and St. Vincent and the Grenadines. MARY BETH NIKITIN, CONG. RESEARCH SERV., RL34327, PROLIFERATION SECURITY INITIATIVE (PSI) 3 (2018).

18. *See infra* notes 123–25.

19. U.N. Charter art. 24(1).

20. The General Assembly is delegated limited dispute settlement authority (peacekeeping) under Chapter VI. *See id.* arts. 34, 35; *see also id.* arts. 11, 12, 14.

21. Most commentators reject the notion that the laws of neutrality are relevant in the context of an embargo or blockade imposed by the Security Council under Chapter VII. In 1945, the French government was the first to take the position that no nation could be neutral with respect to actions by a State in violation of the U.N. Charter. *See* 6 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS 312, 400–01 (1945); U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-

that Article 41 measures will be or have been inadequate, it may impose more severe measures under Article 42, including establishing a blockade or the use of armed force. Alternatively, it may simply authorize the use of “all necessary means” to restore international peace and security.²² Because the United Nations does not have its own armed force or law enforcement agency,²³ enforcement measures are carried out by member States.²⁴ The Security Council determines whether all member States will undertake the enforcement of its decision or only those it designates.²⁵ The applicable Security Council resolution will define the means that the participating States may employ to carry out the enforcement measures imposed by the resolution.²⁶

The history of Security Council resolutions imposing selective or full embargoes against States embroiled in armed conflict or other grave security circumstances now spans more than five decades.²⁷ The resolutions have taken several forms. A 1966 resolution imposed a maritime blockade and

10B/COMDTPUB P5800.7A, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 4.4.4.1.1 (2017) [hereinafter COMMANDER’S HANDBOOK].

22. “[W]hen the Security Council seeks to authorize use of force, the authorizing resolution will normally use the language ‘acting under Chapter VII’ . . . and language specifically authorizing ‘all necessary means,’ which is understood as authorizing use of force, as well as lesser measures.” John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 903, 910 (2012). For an example, see S.C. Res. 678, ¶ 2 (Nov. 29, 1990, which authorized the use of force to remove Iraqi forces from Kuwait).

23. The Charter envisioned that member States would enter into agreements with the United Nations to make armed forces, assistance, and facilities available to the Security Council under plans to be developed with the assistance of a Military Assistance Committee. *See* U.N. Charter arts. 43, 45. In the nearly seventy-five-year history of the United Nations, no such agreements have been concluded.

24. All members of the United Nations are required to accept and carry out the decisions of the Security Council. *Id.* arts. 25, 49. The operative language triggering that obligation is “the Security Council *decides*.”

25. *Id.* art. 48. Eight States have deployed maritime forces to enforce the DPRK sanctions: Australia, Canada, France, Japan, New Zealand, South Korea, the United Kingdom, and the United States. They are frequently shadowed by Chinese naval vessels, which take no part in sanctions enforcement.

26. *See* Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C.182 (1996).

27. *See* Alfred H.A. Soons, *Enforcing the Economic Embargo at Sea*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 307–08 (W. Gowlland-Debbas ed., 2001) (identifying fourteen such resolutions, six of which entailed maritime enforcement measures); Churchill, *supra* note 6; Richard Zeigler, *Ubi Sumus? Quo Vadimus? Charting the Course of Maritime Interception Operations*, 43 NAVAL LAW REVIEW 1 (1996).

authorized the use of force to enforce it.²⁸ Similarly, a 1993 resolution authorized the seizure and forfeiture of vessels and cargoes found to violate its provisions.²⁹ Other Chapter VII measures, including those imposed in response to conflicts in the former Yugoslavia³⁰ and Iraq,³¹ required prolonged maritime enforcement measures. Nonetheless, very few Chapter VII resolutions have authorized participating States to take extraterritorial enforcement measures against non-nationals (i.e., the high seas boarding of foreign vessels) or to conduct enforcement operations in the territorial sea of a State without that State's consent.³²

Whether third-party enforcement of a mandatory Chapter VII measure without flag State consent requires express authorization remains a subject of dispute.³³ The minority view posits that a warship is acting lawfully if it boards and diverts a foreign ship to enforce a Security Council resolution, even if the resolution did not expressly provide for third-party enforcement.³⁴ The Obama administration rejected that view in a 2009 incident in-

28. S.C. Res. 221 (Apr. 9, 1966) (concerning the situation in southern Rhodesia). The resolution authorized the use of force to enforce the blockade on the port of Beira.

29. *See, e.g.*, S.C. Res. 820, ¶ 25 (Apr. 17, 1993) (responding to the Bosnian crisis and directing that vessels in violation “shall be impounded and, where appropriate, they and their cargoes may be forfeited to the detaining state”). Such authority is rare. More commonly, vessels in violation of the embargo are diverted or otherwise prevented from delivering cargo to the target State.

30. *See, e.g.*, S.C. Res. 1160, ¶ 8 (Mar. 31, 1998) (imposing an embargo on arms and related materiel of all types, but not authorizing boardings by States other than the flag State). A 1999 announcement by NATO States of plans to interdict oil shipments into Yugoslavia through the Strait of Otranto proved controversial. *See French Waver on NATO Plan to Choke Yugoslav Oil Imports*, CNN (Apr. 24, 1999), <http://www.cnn.com/WORLD/europe/9904/24/kosovo.04/index.html>.

31. *See, e.g.*, S.C. Res. 665 (Aug. 25, 1990) (calling upon member States that have deployed maritime forces to the Iraq-Kuwait theater to use such measures as are necessary to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure compliance with the embargo imposed by Resolution 661).

32. There are reports that vessels assigned to the Multinational Interception Forces, possibly from Australia, may have pursued ships suspected of violating the U.N. embargo on Iraq into the territorial sea of neighboring Iran. *See* Lois E. Fielding, *Maritime Interception: Centerpiece of Economic Sanctions in the New World Order*, 53 LOUISIANA LAW REVIEW 1191, 1223–24, 1224 n.182 (1993).

33. *See* Soons, *supra* note 27, at 316–17 (identifying two views on the question); *see also* COMMANDER'S HANDBOOK, *supra* note 21, § 4.1.1.

34. *See* Soons, *supra* note 27, at 317. Professor Soons relies on the duty of all States to comply with resolutions of the Security Council and concludes that if the flag State fails to

volving a North Korean cargo ship, the *Kang Nam I*, suspected of transporting materials from the DPRK to Myanmar in violation of Resolution 1874.³⁵ U.S. naval forces surveilled but never attempted to board the vessel.³⁶

Three sets of Chapter VII resolutions issued by the Security Council since 1991 impose State obligations and duties to cooperate in suppressing global terrorism and weapons of mass destruction proliferation.³⁷ The Security Council has also passed a family of resolutions seeking to halt and reverse nuclear weapons and missile delivery programs in the DPRK and Iran.³⁸ Security Council resolutions trigger the U.N. Charter's Article 1 obligation for all States to take effective collective measures to prevent and remove threats to the peace and the Article 2 obligation to refrain from giving assistance to any State and, by necessary implication, any non-State entity, against which the United Nations is taking preventive or enforcement action.³⁹

III. INTERNATIONAL RULES-BASED ORDER IN THE MARITIME DOMAIN

Popular writing often depicts the high seas as a vast, lawless expanse targeted by all manner of plunderers, traffickers, and despoilers.⁴⁰ In answer to the

comply, third-party action may be justified as a lawful countermeasure or, alternatively, under the principle of necessity.

35. David E. Sanger, *U.S. to Confront, Not Board, North Korean Ships*, NEW YORK TIMES (June 16, 2009), <https://www.nytimes.com/2009/06/17/world/asia/17korea.html>.

36. The vessel aborted the voyage and returned to the DPRK. *See* Arkar Moe, *Suspected North Korean Ship Returns Home*, IRAWADDY (July 7, 2009), https://www2.irrawaddy.com/article.php?art_id=16285. A 2011 incident involving the M/V *Light* and USS *McCampbell* ended in similar fashion. Belize, the flag State, consented to a boarding while the vessel was en route to Myanmar, but the master refused and the vessel returned to the DPRK. *See* William Wan & Craig Whitlock, *North Korean Ship Turned Back by U.S. Navy*, WASHINGTON POST (June 13, 2011), https://www.washingtonpost.com/national/national-security/north-korean-ship-turned-back-by-us-navy/2011/06/13/AG7wxLTH_story.html.

37. The principal resolutions of interest include S.C. Res. 687 (Apr. 3, 1991); S.C. Res. 1172 (June 6, 1998); S.C. Res. 1373 (Sept. 28, 2001); S.C. Res. 1540 (Apr. 28, 2004); and S.C. Res. 1617 (July 29, 2005); *see also* Jochen Frowein & Nico Kirsch, *Introduction to Chapter VII*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 701 (Bruno Simma et al. eds., 2d ed. 2002).

38. *See, e.g., supra* note 1.

39. U.N. Charter arts. 1(1), 2(5); *see also* Brian Wilson, *The Turtle Bay Pivot: How the United Nations Security Council Is Reshaping Naval Pursuit of Nuclear Proliferators, Rogue States, and Pirates*, 33 EMORY INTERNATIONAL LAW REVIEW 1 (2018).

40. *See, e.g.,* IAN URBINA, *THE OUTLAW OCEAN: JOURNEYS ACROSS THE LAST UNTAMED FRONTIER* (2019); WILLIAM LANGEWIESCHE, *THE OUTLAW SEA* (2004); G.O.W. MUELLER & FRED A. ADLER, *OUTLAWS OF THE OCEAN* (1985).

challenge, U.S. naval forces⁴¹ have engaged in maritime security operations designed to bring rules-based order to the maritime domain since 1790, when the U.S. Congress established what was to become the U.S. Coast Guard. In 1801, President Thomas Jefferson dispatched the new nation's Navy and Marines to the Mediterranean to vanquish the Barbary Pirates.⁴²

Maritime security operations remain one of the core competencies of naval forces today.⁴³ In the broadest sense, particularly among the partner nations who answered the call in the early years of the twenty-first century following a series of terrorist and pirate attacks and the breakdown of the nonproliferation regime, maritime security operations seek to preserve, restore, or enhance security in the maritime environment and to promote stability and global prosperity.⁴⁴

At-sea vessel boardings are intrusive and inconvenient for the boarded vessel and frequently difficult and even dangerous for the boarding team. However, they are sometimes necessary to ensure effective enforcement of the rule of law. These boardings have been carried out through a combination of national, bilateral, and multilateral forces. Maritime security operations embrace missions designed to counter maritime-related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and irregular migration. As such, they complement the counterterrorism and security efforts of regional States and seek to impede the use of the maritime environment as a venue or medium for attack or to transport personnel, weapons, or other materials. Maritime security operations activities

41. Used here, the term "U.S. naval forces" includes the U.S. Navy, U.S. Marine Corps, and U.S. Coast Guard. See U.S. DEPARTMENT OF THE NAVY, NAVAL DOCTRINE PUBLICATION 1: NAVAL WARFARE 1 (2010) [hereinafter NAVAL DOCTRINE PUBLICATION 1].

42. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOWER 26 (2015) (describing the naval forces maritime security operations mission).

43. NAVAL DOCTRINE PUBLICATION 1, *supra* note 41, ch. 3. The others are operational access, deterrence, sea control, power projection, search and rescue, logistics, defense support of civil authorities, and humanitarian assistance/disaster response.

44. Chapters 3 and 4 of the *Commander's Handbook* provide an overview of the law of peacetime naval operations. The working definition of "maritime security operations" is set out in *Naval Operations Concept* as "those tasks and operations conducted to protect sovereignty and maritime resources, support free and open seaborne commerce, and to counter maritime related terrorism, weapons proliferation, transnational crime, piracy, environmental destruction, and illegal seaborne migration." U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NAVAL OPERATIONS CONCEPT 2010: IMPLEMENTING THE MARITIME STRATEGY 35 (2010) [hereinafter NAVAL OPERATIONS CONCEPT 2010].

overlap with and draw on theater security cooperation, maritime interception, expanded maritime interception, and law enforcement operations.⁴⁵

The U.S. *National Strategy for Maritime Security*,⁴⁶ jointly developed by the Department of Defense (DoD) and the Department of Homeland Security and promulgated by the president in 2005, sought to address the troublesome seam between peacetime law enforcement operations and the deployment of armed force against large-scale threats in or from the maritime domain.⁴⁷ The traditional binary approach, based on the belief that the two paradigms for peace and war are mutually exclusive, has proven wholly unsatisfactory. The peace side of the security operations spectrum seeks to maintain order through law enforcement activities carried out with respect for human and civil rights. Law enforcement is reactive, and privacy interests limit the scope and use of intelligence. By contrast, the law of armed conflict governs the war side of the spectrum; here, there is a heavy reliance on intelligence. Both ends depend on credible deterrence for their success. It is important to note that the most legitimate endgame for maritime security missions in the eyes of many is an arrest and prosecution, which requires law enforcement authority. The choice of platform employed and the uniforms worn by boarding teams can thus have a significant impact on perceived legitimacy.

A. Peacetime Visit, Board, Search, and Seizure Distinguished

Visit, board, search, and seizure (VBSS) teams, drawn from components of the U.S. naval forces, generally carry out vessel interceptions and boardings by naval vessels. Coast Guard interception and boarding teams may operate from Coast Guard boats or cutters or allied naval vessels.⁴⁸ Boarding teams

45. See generally JAMES KRASKA & RAUL PEDROZO, INTERNATIONAL MARITIME SECURITY LAW (2013); NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA (2011); MARITIME SECURITY, INTERNATIONAL LAW AND POLICY PERSPECTIVES FROM AUSTRALIA AND NEW ZEALAND (D.R. Rothwell et al. eds., 2009).

46. U.S. DEPARTMENT OF HOMELAND DEFENSE & U.S. DEPARTMENT OF DEFENSE, NATIONAL STRATEGY FOR MARITIME SECURITY (2013).

47. The U.S. Coast Guard is the lead federal agency for maritime homeland security. U.S. Northern Command has responsibility for homeland defense of the continental United States, Alaska, and the surrounding waters out to five hundred nautical miles. See COMMANDER'S HANDBOOK, *supra* note 21, § 3.12.

48. In early 2019, the U.S. Coast Guard dispatched the USCGC *Bertholf* for an extended deployment in the Western Pacific. On March 24–25, 2019, *Bertholf* and USS *Curtis Wilbur* transited the Taiwan Strait together under the operational control of U.S. Seventh Fleet. See U.S. Navy Destroyer, Coast Guard Cutter Transit Taiwan Strait, USNI NEWS (Mar. 25, 2019), <https://news.usni.org/2019/03/25/42133>.

from U.S. Navy ships may include Navy, Marine Corps, and Coast Guard personnel. In most cases, Coast Guard law enforcement detachments (LE-DET) on naval vessels serve under the operational or tactical control of the cognizant Coast Guard command authority when conducting boardings.⁴⁹ In cases not calling for law enforcement measures, however, the LEDET may operate under DoD control, drawing on the Coast Guard's statutory authority to assist other government agencies.⁵⁰ Boarding team composition and operations are adapted to the mission and the perceived threat level, including the extent to which the suspect vessel and its crew are deemed likely to be cooperative.

Vessel boardings fall into one of three categories: compliant, noncompliant, and opposed.⁵¹ A compliant vessel boarding is one in which the suspect vessel complies with the directions of the on-scene commander, there is no apparent active or passive resistance by the crew, and intelligence indicates that neither the vessel nor the crew pose a threat.

By contrast, a noncompliant vessel boarding is one in which there is no intelligence data to indicate a threat, but the vessel employs active or passive measures to prevent or impede the boarding phase of the operation. To be characterized as noncompliant, any (or all) of the following conditions must be met: the vessel fails to comply with the warship's directions and employs passive measures intended to delay, impede, complicate, or deter access to spaces required for control of the vessel. These measures are of a nature that they can be overcome by mechanical means.

Opposed boardings include actions that surpass noncompliance are those in which any or all of the following conditions are present: the employment of active or passive resistance clearly intended to inflict serious bodily harm or even death to the boarding team; the suspect vessel demonstrates the intent to actively oppose the boarding by inflicting serious bodily harm or using deadly force against the boarding team; intelligence indicates a possible threat to inflict serious bodily harm or death to the boarding team; and the demonstration of hostile action, including the threatening display of

49. *See* 10 U.S.C. § 379 (2012).

50. 14 U.S.C. § 701 (2018).

51. U.S. NAVY, U.S. COAST GUARD & U.S. MARINE CORPS, NTTP 3-07.11M/CGTTP 3-93.3/MCIP 3-33.04, VISIT, BOARD, SEARCH, AND SEIZURE OPERATIONS 1–2 (2013) [hereinafter VBSS OPERATIONS]; *see also* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-32: JOINT MARITIME OPERATIONS, at IV-19–IV-20 (2018); MARTIN FINK, MARITIME INTERCEPTION AND THE LAW OF NAVAL OPERATIONS (2018); Wolff Heintschel von Heinegg, *Maritime Interception/Interdiction Operations*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS (Terry Gill & Dieter Fleck eds., 2015).

weapons. Armed resistance to Israel's boarding of the Gaza blockade-running MV *Mavi Marmara* in 2010 presents a dramatic example of an opposed boarding.⁵²

The U.S. Navy and Coast Guard publication *Maritime Interception Operations* draws on the distinction between compliant, noncompliant, and opposed boardings.⁵³ It further breaks down noncompliant boardings into two levels based on the anticipated threat level. Special operations forces or other specially trained and designated assault and boarding teams will normally conduct opposed boardings and may conduct noncompliant vessel boardings. Few of the U.S. vessels assigned to sanctions enforcement in the Western Pacific carry such specialized boarding teams.

B. *Maritime Interception Operations*

The *Visit, Board, Search, and Seizure Operations* publication, which applies only in peacetime, outlines the naval tactics, techniques, and procedures used to conduct unilateral or joint maritime interception operations and VBSS operations and serves as the doctrinal basis for U.S. multinational operations.⁵⁴ It does not apply to naval blockade or neutrality enforcement boardings during armed conflicts. Although the Marine Corps, Navy, and Coast Guard jointly promulgated the publication, Coast Guard boarding teams conduct their maritime law enforcement boardings under the guidance provided by the Coast Guard *Maritime Law Enforcement Manual*.⁵⁵

Maritime interception operations (MIO)⁵⁶ by U.S. naval forces are conducted to deny suspect vessels access to specific ports for import or export of prohibited goods to or from a specific nation or nations or non-State-

52. For the facts of what has become known as the “flotilla incident,” see U.N. Secretary-General’s Panel of Inquiry, *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, ¶¶ 67–134 (Sept. 2011).

53. OFFICE OF THE CHIEF OF NAVAL OPERATIONS & HEADQUARTERS, U.S. COAST GUARD, NTTP 3-07.11M, COMDTINST M3330.1, MARITIME INTERCEPTION OPERATIONS (2008).

54. VBSS OPERATIONS, *supra* note 51.

55. U.S. COAST GUARD, COMDTINST M16247.1G, MARITIME LAW ENFORCEMENT MANUAL (2017) (FOUO).

56. The MIO acronym has been used to refer alternatively to maritime interdiction operations and maritime interception operations. The term “interdiction” has a negative connotation for some States. *See generally* FINK, *supra* note 51.

sponsored organizations.⁵⁷ Their purpose is peacekeeping or sanctions enforcement. In contrast to law enforcement operations,⁵⁸ MIO are military missions.⁵⁹ Peacetime MIO activities are conducted in accordance with international law, excluding the law of armed conflict, but including the rules on enforcement jurisdiction. The *Commander's Handbook* lists nine legal bases for conducting MIO, all but two of which (belligerent right of visit and inherent right of self-defense) apply in peacetime MIO.⁶⁰

Resolutions, lawful orders, or other directives of the U.N. Security Council or some other competent regional or national authority normally provide the authority to conduct MIO. Expanded MIO (EMIO) are maritime interception operations designed to intercept targeted personnel or material that pose an imminent threat to the United States or coalition members.⁶¹ Maritime counterproliferation interdiction (MCPI) is the use of naval forces to combat the proliferation of weapons of mass destruction, including nuclear, biological, and chemical weapons; their delivery systems; and related material. VBSS operations are the procedures by which forces conduct MIO, EMIO, and MCPI boardings and searches to determine the true character and nature of vessels, cargo, and passengers.

Not every activity that threatens international peace and security is a violation of domestic law. Put another way, not every successful MIO boarding will lead to a law enforcement action. The December 2002 interception of the M/V *So San* by Spanish and U.S. naval patrol forces in the western

57. The U.S. Department of Defense defines maritime interception operations as the “efforts to monitor, query, and board merchant vessels in international waters to enforce sanctions against other nations such as those in support of United Nations Security Council Resolutions and/or prevent the transport of restricted goods.” OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, *DoD Dictionary of Military and Associated Terms (As of October 2019)* (2019) 136, <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf?ver=2019-04-25-095717-503>.

58. Law enforcement operations (LEO) are a specialized form of interception operations. The Coast Guard is the lead agency for maritime LEO. Department of Defense personnel are generally precluded by the *Posse Comitatus* Act from direct involvement in LEO. *COMMANDER'S HANDBOOK*, *supra* note 21, § 3.11.3.1.

59. *But see* Rob McLaughlin, *Authorizations for Maritime Law Enforcement Operations*, 98 *INTERNATIONAL REVIEW OF THE RED CROSS* 465 (2016) (relying on a broader definition of maritime law enforcement operations).

60. *COMMANDER'S HANDBOOK*, *supra* note 21, § 4.4.4.1. The other bases for conducting MIO include operations pursuant to Security Council resolutions, flag State consent, master's consent, right of visit, stateless vessels, conditions on port entry, and bilateral/multilateral agreements.

61. *NAVAL OPERATIONS CONCEPT 2010*, *supra* note 44, at 43.

Indian Ocean demonstrates this point. Exercising a right of visit under Article 110 of the Law of the Sea Convention, VBSS teams discovered fifteen Scud ballistic missiles, missile components, and propellant being shipped from the DPRK to the Mideast.⁶² Because the vessel was not in violation of any applicable Spanish or U.S. domestic law, however, it was released to deliver its cargo to Yemen. For the United States, the domestic North Korea Sanctions and Policy Enhancement Act of 2016⁶³ would lead to a different outcome today.

IV. EVOLUTION OF THE RIGHT OF APPROACH AND VISIT

In and on the great commons that is the high seas, ships of all States enjoy certain time-honored freedoms, including the freedom of navigation and fishing.⁶⁴ Although the International Tribunal for the Law of the Sea recently recognized that freedom of navigation is a fundamental principle of the law of the sea,⁶⁵ that freedom is not unlimited. The high seas are reserved for peaceful purposes, and any use of the high seas must be carried out with due regard for the interests of other States.⁶⁶ While on the high seas, vessels eligible to exercise those freedoms are generally subject to the exclusive jurisdiction of their flag State.⁶⁷ The flag State's jurisdiction is not merely discretionary. Indeed, the flag State is required to exercise effective jurisdiction and

62. The facts are taken primarily from *Shipment of Scud Missiles to Yemen*, 2002 U.S. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 18, §C(3), at 1052.

63. *See supra* note 1.

64. *See* HUGO GROTIUS, *MARE LIBERUM* (1608), reprinted in HUGO GROTIUS *DE JURE PRÆDÆ* ch. 12 (M. Nijhoff Press 1864); JAMES KRASKA & RAUL PEDROZO, *THE FREE SEA: THE AMERICAN FIGHT FOR FREEDOM OF NAVIGATION* 272 (2018) (“The concept of freedom on the seas was inherited from the Dutch by the British, and passed on to the Americans as an expression of the freedom of all states to trade and use the global commons without hindrance.”).

65. *M/V “Norstar” (Panama v. Italy)*, Case No. 25, Judgment of Apr. 10, 2019, ¶¶ 216–18, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Judgment/C25_Judgment_10.04.pdf. “Freedom of navigation would be illusory if a ship—a principal means for the exercise of the freedom of navigation—could be subject to the jurisdiction of other States on the high seas.” *Id.* ¶ 216.

66. United Nations Convention on the Law of the Sea arts. 87(2), 88, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter LOS Convention]. The United States is not a party.

67. *Id.* art. 92(1). The principle provides that “the exclusive jurisdiction of the flag state precludes any interference whatsoever with merchant vessels on the high seas by a foreign warship.” MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW* 886 (rev. ed. 1987).

control over its vessels. For a variety of reasons, however, some flag States fail to exercise effective jurisdiction and control. In addition, stateless vessel operators escape flag State jurisdiction and control altogether. As a result, the law of the sea has historically recognized limited circumstances under which a non-flag State may exercise extraterritorial jurisdiction or otherwise “interfere” with a foreign flag vessel’s navigation on the high seas.

When the flag State is either unable or unwilling to effectively discharge its obligation under international law to exercise effective jurisdiction and control, the enforcement deficit may threaten the global commons and the interests of other States in those waters. Article 110 of the Law of the Sea Convention codifies the right of visit on the high seas.⁶⁸ It represents one attempt to address the tension between the principles of freedom of navigation and exclusive flag State jurisdiction, on the one hand, and the common interest in ensuring effective enforcement of laws against certain serious offenses on the other. Much like the “stop and frisk” accommodation made by the U.S. Supreme Court in *Terry v. Ohio*,⁶⁹ the right of visit permits a minimal intrusion on a vessel’s navigation rights in the name of effective law enforcement. Not all legal prohibitions are serious enough to justify interference with a vessel’s high seas navigation by States other than the flag State, but two serious prohibitions have long stood out: those against the maritime slave trade⁷⁰ and piracy.⁷¹

As the twenty-first century got underway, the multinational naval forces patrolling waters off Somalia rediscovered the right of visit as an anti-piracy tool.⁷² Now, as maritime trafficking in drugs, weapons, and persons become

68. LOS Convention, *supra* note 66, art. 110.

69. 392 U.S. 1 (1968).

70. LOS Convention, *supra* note 66, art. 110(1)(b).

71. *Id.* art. 105 (providing for universal jurisdiction over piracy); *see also Piracy*, 26 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 739 (1932). The assimilation of the slave trader to the pirate probably stems from the fact that an 1824 act of the British Parliament declared slave trading to be piracy. *See Act to Amend and Consolidate the Laws Relating to the Abolition of the Slave Trade 1824*, 5 Geo. 4, c. 113, § 9. There is no indication that the 1926 Slavery Convention or the Supplementary Convention of 1956 subjected alleged perpetrators to universal jurisdiction. *See Convention on Suppression of Slave Trade and Slavery*, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253, as amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479; T.I.A.S. 3532, as supplemented by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. 6418, 266 U.N.T.S. 40.

72. *See, e.g., CTF 151: Counter-Piracy*, COMBINED MARITIME FORCES, <https://combined-maritimeforces.com/ctf-151-counter-piracy/> (last visited Nov. 12, 2019).

more common and widespread, the right of visit will be put to new uses. The need to interdict transnational terrorists and the transport of weapons of mass destruction and their delivery systems have persuaded some that enforcement measures by States other than the flag State might be necessary to preserve international peace and security. The 2005 Protocol to the SUA Convention, which entered into force on July 28, 2010, seeks to address those concerns, but ratifications and applications have been limited.⁷³

A. From Customary Law to Conventional Codification

As with international law generally, the law of the sea distinguishes the State's jurisdiction to prescribe laws from its jurisdiction to enforce its laws.⁷⁴ International law recognizes five bases for a State to prescribe laws.⁷⁵ The two most widely accepted principles are territoriality (jurisdiction over conduct in the State's territory)⁷⁶ and nationality (jurisdiction over conduct by nationals of the States and on vessels and aircraft registered in the State). Protective jurisdiction permits a State to prescribe laws to protect its vital national interests, such as the security of its currency against counterfeiting. Passive personality refers to the principle that a State may prescribe laws governing conduct that injures one of its nationals. Universal jurisdiction applies to universally condemned acts, such as piracy, over which any State has jurisdiction regardless of the location of the crime or the nationality of the actors.

73. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. No. LEG/CONF.15/21 (Nov. 1, 2005) (entered into force July 28, 2010) [hereinafter 2005 SUA Protocol]. Only forty-seven States (including the United States) have ratified the 2005 SUA Protocol. It has failed to reach its potential, both for lack of parties and reluctance of the parties to grant advance consent to boardings to enforce the SUA Convention and Protocol. *See generally* Scott D. MacDonald, *The SUA 2005 Protocol: A Critical Reflection*, 28 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 485 (2013); Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 287 (2007).

74. *See generally* JURISDICTION OVER SHIPS: POST-UNCLOS DEVELOPMENTS IN THE LAW OF THE SEA 1 (Henrick Ringbom ed., 2015).

75. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (AMERICAN LAW INSTITUTE 1987) [hereinafter THIRD RESTATEMENT]. Note that some sections of the *Third Restatement* were not carried forward into the *Fourth Restatement*. As a result, reference will be to the *Third Restatement*.

76. The "objective territoriality" principle extends territoriality by recognizing that a State may prescribe laws occurring outside its territory where those acts have an effect in the territory.

The 1927 S.S. *Lotus* decision by the Permanent Court of International Justice demonstrates that a State might be competent to prescribe laws applicable to a foreign vessel for acts outside the State's territory; however, it may not be able to enforce its laws until the vessel enters its territory.⁷⁷ Accordingly, the decision confirms the general principle that, with limited exceptions, a vessel on the high seas is subject to the exclusive enforcement jurisdiction of its flag State.

Still, exclusive flag State jurisdiction is subject to well-known exceptions. For example, pirate ships are subject to universal jurisdiction. The flag State may also consent to enforcement actions by other States. Some flag States have entered into standing agreements with "enforcement" States to carry out their Law of the Sea Convention obligations as flag States to suppress narcotics trafficking by their vessels.⁷⁸ Protocols to the U.N. Convention on Transnational Organized Crime,⁷⁹ Proliferation Security Initiative,⁸⁰ 2005 SUA Convention Protocol, and Straddling Fish Stocks Agreement⁸¹ call for similar agreements facilitating non-flag State boardings. Vessels may also be

77. *See, e.g.*, S.S. *Lotus* (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

78. Article 108 of the LOS Convention imposes on all States a duty to cooperate "to the fullest extent possible" in the suppression of drug trafficking "in conformity with the international law of the sea." LOS Convention, *supra* note 66, art. 108. The "LOS conformity" provision preserves the flag State's primacy in jurisdiction and control over its vessels while on the high seas. Article 17 of the 1988 Convention Against Illicit Traffic in Narcotic Drugs provides a framework for flag States to grant their consent to boardings by able and willing States. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter U.N. Drugs Convention].

79. United Nations Convention on Transnational Organized Crime, *opened for signature* December 12, 2000, 2225 U.N.T.S. 209.

80. The PSI remains quite active. As of April 2019, 107 State have endorsed the Proliferation Security Initiative Statement of Interdiction Principles. *See* PROLIFERATION SECURITY INITIATIVE, ENDORSING STATES LIST (Apr. 2, 2019), <https://www.psi-online.info/psi-info-en/botschaft/-/2205942>. Further, at the May 2018 High-Level Political Meeting of the Proliferation Security Initiative, PSI participating States adopted four new joint statements. *See* Department Press Briefing, Heather Nauert, Spokesperson, U.S. Department of State (May 29, 2018), <https://www.state.gov/briefings/departments-press-briefing-may-29-2018/>.

81. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 2167 U.N.T.S. 3, *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1542 (1995).

subject to a right of visit by the warships of other States under Article 110 of the Law of the Sea Convention.⁸²

Article 110 has its roots in Article 22 of the 1958 Geneva Convention on the High Seas⁸³ and substantial prior State practice. The right to approach a vessel on the high seas to determine the vessel's identity and flag was first claimed in the latter half of the eighteenth century and developed throughout much of the nineteenth century. Naval vessels relied on the right of approach (*enquête du pavillon*) in their efforts to interdict the scourges of piracy and slave trading and transport.⁸⁴ Early in the nineteenth century, customary law recognized the right of a warship to "approach" in international waters a foreign vessel, other than a vessel enjoying sovereign immunity, to verify the approached vessel's nationality.⁸⁵ The U.S. Supreme Court examined the right of approach in its 1836 decision, *The Marianna Flora*. Writing for the Court, Justice Joseph Story distinguished between a belligerent's right of visitation and search in time of war and the peacetime right of approach.⁸⁶ In describing the latter right, Justice Story explained:

In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority⁸⁷

82. It is important to avoid confusing the peacetime right of visit under the LOS Convention with the belligerents' right of visit and search to enforce the law of neutrality under the law of naval warfare. The latter is examined in Part II of the COMMANDER'S HANDBOOK, *supra* note 21, and the International Institute of Humanitarian Law's *San Remo Manual*. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶¶ 118–24 (Louise Doswald-Beck ed., 1994). Cases concerning the boarding of neutral vessels during armed conflicts were extensively examined by the court of appeals in *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987).

83. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

84. 4 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 7, at 667–71 (1965).

85. C. JOHN COLOMBOS, INTERNATIONAL LAW OF THE SEA §§ 334–36, at 311–14 (6th ed. 1967); 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 801–08 (Ivan A. Shearer ed., 1984); MCDUGAL & BURKE, *supra* note 67, at 885–93; RENÉ-JEAN DUPUY & DANIEL VIGNES, A HANDBOOK ON THE NEW LAW OF THE SEA 420–22 (1991); JAMES WHITMAN, AN INQUIRY INTO THE RIGHT OF VISIT OR APPROACH BY SHIPS OF WAR (1858).

86. *The Marianna Flora*, 4 U.S. (11 Wheat.) 1 (1826).

87. *Id.* at 43–44.

One of the issues presented in the case was whether the *Marianna Flora* was justified in firing upon the approaching vessel (a U.S. warship) out of concern that that vessel was in fact a pirate ship or otherwise harbored hostile intent. Justice Story went on to explain the obligation of an approached vessel:

On the other hand, it is as clear that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precaution to avoid a suspected sinister enterprise or hostile attack.⁸⁸

Thus, the right of the warship to approach does not imply a duty by the approached vessel to respond or to slow or otherwise maneuver to accommodate the approach. However, failure to respond to questions might provide a reasonable suspicion upon which to base a right of visit.

The dominant view as late as 1950 was that while States had a right of *approach* to a foreign vessel,⁸⁹ there was no follow-on right of *visit* during peacetime (other than for foreign vessels suspected of damaging submarine cables).⁹⁰ Codification of such a right was one of the progressive developments of the 1958 Convention on the High Seas. Article 22 provided:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high

88. *Id.* at 44.

89. *See, e.g.*, JOSEPH LOHENGRIN FRASCONA, VISIT, SEARCH, AND SEIZURE ON THE HIGH SEAS 22–23 (1938) (noting that the European conception of the right of visit included both visit and search, while the Americans and British considered visit, search, and seizure to be separate). In the “visitation crisis” between the United States and Great Britain, the United States denied that Great Britain had the right to visit (board) vessels on the high seas flying the U.S. flag suspected of being engaged in the slave trade to determine if they were in fact U.S. vessels. In response to Britain’s assertion of a right of visit to suppress slavery, Secretary of State John Quincy Adams reportedly answered that the only thing worse than slavery would be admitting the right of search “for that would be making slaves of ourselves.” H.G. SOULSBY, THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS, 1814–1862, at 18 (1933). Britain agreed there was no such right in 1858. *See* 3 FRANCIS WHARTON, DIGEST OF INTERNATIONAL LAW 122–71 (2d ed. 1887); 2 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 914–51 (1906).

90. Article X of the 1884 Convention for the Protection of Submarine Cables conferred on warships a limited right to board vessels suspected of damaging or interfering with submarine cables on the high seas, in order to inspect their documentation. Convention for the Protection of Submarine Cables art. X, Mar. 14, 1884, 24 Stat. 989.

seas is not justified in boarding her unless there is reasonable ground for suspecting:

- (a) That the ship is engaged in piracy; or
- (b) That the ship is engaged in the slave trade; or
- (c) That though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.⁹¹

U.S. courts construing and applying Article 22 accepted that approach and visit were united in the Article. In *United States v. Romero-Galue*, for example, the court described the “right of approach” as

a doctrine of international maritime common law that bestows a nation's warship with the authority to hail and board an unidentified vessel to ascertain its nationality. If suspicions as to the vessel's nationality persist, as they well may even after the captain has declared her nation of registry, the inquiring nation may board the vessel and search for registration papers or other identification in order to verify the vessels nationality.⁹²

Similarly, in *United States v. Postal*, a federal appellate court described Article 22 as embodying “[a]nother exception to the principle of noninterference on the high seas, traditionally known as the right of approach or visitation.”⁹³

91. Convention on the High Seas, *supra* note 83, art. 22.

92. 757 F.2d 1147, 1149 n.3 (11th Cir. 1985).

93. 589 F.2d 862, 870 (5th Cir. 1979) (holding that the right of approach justified the Coast Guard's first boarding of a foreign vessel, but not the second boarding, after vessel's registry had been confirmed), *cert. denied*, 442 U.S. 832 (1979); *see also* *United States v. Williams*, 617 F.2d 1063, 1082 (5th Cir. 1980) (using the terms “approach” and “visit” interchangeably, stating that “Article 22 is a codification a traditional doctrine of international maritime law that is, the right of approach or the right of visitation”).

Despite the recognition in Article 22 that the customary right of approach included a right of visit under some circumstances, courts and commentators often refer to the right simply as one of “approach.”⁹⁴ The usage may reflect the fact that throughout its history, the United States has opposed attempts to analogize between the peacetime right of approach and visit and the belligerent’s right of visit and search.⁹⁵ Nevertheless, it is important to bear in mind that the right of visit extends beyond the mere right of approach.

B. The Right of Visit under the 1982 U.N. Convention on the Law of the Sea

Despite the Law of the Sea Convention’s near-universal acceptance by other States, the United States is not yet a party. U.S. President Ronald Reagan declared in 1983 that most of the provisions within the Convention codified existing customary international law, which the United States would follow.⁹⁶ Nonetheless, the United States refused to sign the Convention, citing objections to its deep seabed mining regime.⁹⁷ In 1994, after the U.N. General Assembly approved the implementation agreement amending the seabed mining provisions of the Convention, President Clinton presented the Convention to the Senate for its advice and consent.⁹⁸ Since that time, the U.S. Senate Committee on Foreign Relations has held hearings and taken committee votes, but the full Senate has not taken action.⁹⁹

94. *See, e.g.*, *United States v. Ricardo*, 619 F.2d 1124, 1130 (5th Cir. 1980).

95. *See* Louis Sohn, *Peacetime Use of Force on the High Seas*, 64 INTERNATIONAL LAW STUDIES 38, 38 (1991).

96. *See* Presidential Statement on United States Ocean Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983), *reprinted in* 22 INTERNATIONAL LEGAL MATERIALS 464 (1983).

97. *See* Presidential Statement on United States Actions Concerning the Conference on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 9, 1982).

98. The President forwarded the Convention to the Senate for its advice and consent on October 7, 1994. President’s Message to Congress Transmitting United Nations Convention on the Law of the Sea, with Annexes, Dec. 10, 1982, S. TREATY DOC. 103-39, 103d Cong. (1994), *reprinted in* 34 INTERNATIONAL LEGAL MATERIALS 1309; *see also* Marian Nash (Leigh), *Contemporary Practice of the United States Relating to International Law*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 96, 112–15 (1995).

99. The most recent hearing was on May, 23 2012. *See The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Hearings Before the S. Comm. on Foreign Relations*, 112th Cong. (2012), <https://www.foreign.senate.gov/hearings/the-law-of-the-sea-convention-treaty-doc-103-39-the-us-national-security-and-strategic-imperatives-for-ratification>.

Under Article 110 of the 1982 Convention, a warship has a limited right to visit a foreign vessel on the high seas under specific circumstances.¹⁰⁰ Article 110, which added two grounds for exercising the right that were not included in the 1958 Convention, now provides:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
 - (a) the ship is engaged in piracy;¹⁰¹
 - (b) the ship is engaged in the slave trade;¹⁰²
 - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;¹⁰³
 - (d) the ship is without nationality;¹⁰⁴ or
 - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

100. LOS Convention, *supra* note 66, art. 110; *see also* 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 237–46 (Myron Nordquist et al. eds., 1995) (discussing Article 110); COMMANDER'S HANDBOOK, *supra* note 21, § 3.4; United States v. *Juda*, 46 F.3d 961, 969 (9th Cir. 1995) (holding that the Coast Guard was entitled to verify the ship's right to fly its flag by examining its documents and, if necessary, by an examination on board the ship, and when the master refused and threatened to shoot at the Coast Guard boat "the Coast Guard was authorized to seize" the vessel).

101. Article 101 of the LOS Convention defines piracy. LOS Convention, *supra* note 66, art. 101.

102. Articles 99 and 100 of the LOS Convention address slave trading. *Id.* arts. 99, 100.

103. This provision addresses the geographically narrow, but one-time vexing problem of "pirate radio stations." The phenomenon was the subject of a 2009 film titled "Pirate Radio: The Boat that Rocked," starring the late Oscar winner Philip Seymour Hoffman.

104. A ship is "without nationality" if it is not validly registered in any State or it can be "assimilated to a ship without nationality." LOS Convention, *supra* note 66, art. 92(2). A commonly used definition of a "vessel without nationality" is set out in the U.S. Maritime Drug Law Enforcement Act, 46 U.S.C. § 70502(d)(1) (2012).

3. If the suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.¹⁰⁵

By its terms, Article 110 applies only to vessels on the high seas; however, Articles 88 to 115 also apply within a coastal State's exclusive economic zone (EEZ) in so far as such an application would not be incompatible with the EEZ regime.¹⁰⁶ Regardless of the location, warships and government-owned ships on non-commercial service are immune from boarding.¹⁰⁷ A warship is

[a] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State of whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.¹⁰⁸

The definition of government-owned ships on non-commercial service is less straightforward—"ships owned or operated by a State and used only on government non-commercial service."¹⁰⁹

Like Article 22 of the 1958 Convention on the High Seas, Article 110 addresses the grounds for a warship to "interfere" with a foreign vessel on the high seas and the limited right of a warship to "board" a foreign vessel on the high seas. 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, which spoke only of sending a boarding team by boat, Article 110 of the 1982 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. It is increasingly common for warships to send boarding teams by helicopter.

105. LOS Convention, *supra* note 66, art. 110.

106. *Id.* art. 58(2); *see also* 33 C.F.R. § 2.05-1 (2010); 16 U.S.C. § 5502(4)(A) (2012).

107. LOS Convention, *supra* note 66, arts. 95, 96

108. *Id.* art. 29.

109. *Id.* art. 96.

In the second half of the twentieth century, as traffickers turned from alcohol to narcotics and psychotropic drugs, the right of approach was again pressed into service—along with the new right of visit—in response to traffickers’ attempts to avoid interdiction by concealing or misrepresenting their vessel’s nationality or even leaving the vessel unregistered.¹¹⁰ The resurgence of piracy beginning in the late 1970s gave new relevance to the right of visit, while the short-term nuisance posed by unauthorized broadcasting and the need for the corresponding visit right had largely faded before the 1982 Convention was opened for signature. As maritime trafficking in weapons and human migrants becomes more common, and maritime terrorism persists as a growing global concern, some advocate an expanded right of approach. The reformists’ suggestions generally take one of two approaches. The first approach recognizes the limited nature of the existing right and advocates amendments to the rule or supplementary regimes to address the rule’s perceived shortfalls.¹¹¹ The second approach eschews the amendment path and argues instead for an expansive interpretation of the existing rules on visit rights respecting piracy or slave transport to meet new threats posed by maritime terrorism and human trafficking.¹¹²

C. *Current Understanding of the Right of Visit*

Article 110 recognizes a right of visit in five situations where there are reasonable grounds for suspecting that (1) the ship is engaged in piracy; (2) the ship is engaged in the slave trade; (3) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under Article 109; (4) the ship is without nationality;¹¹³ and (5) though flying a foreign flag

110. See Andrew W. Anderson, *In the Wake of the Dauntless: The Background and Development of Maritime Interdiction Operations*, in *THE LAW OF THE SEA: WHAT LIES AHEAD?* 21 (Thomas A. Clingan ed., 1988).

111. See, e.g., Erik Jaap Molenaar, *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa 1 and the South Tomi*, 19 *INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW* 19 (2004) (arguing for progressive development in the LOS Convention Article 111 right of hot pursuit).

112. See, e.g., Samuel Pyeatt Menefee, *The Smuggling of Refugees by Sea: A Modern Day Maritime Slave Trade*, 2 *REGENTS JOURNAL OF INTERNATIONAL LAW* 1 (2003–2004).

113. A right of visit boarding is warranted when there are no indicators of nationality or when there is clear, articulable evidence indicating that the indicators or claims of nationality are false or conflicting.

or refusing to show its flag, the ship is of the same nationality as the warship.¹¹⁴ Two of those grounds, unauthorized broadcasting and statelessness, were not included in the 1958 Convention on the High Seas. The right of visit in cases of suspicion of unauthorized broadcasting is not universal, as only States that would potentially have jurisdiction over an unauthorized broadcasting offense under Article 109 may exercise the related right of visit.¹¹⁵ The right of visit includes the right to use necessary force to compel compliance or to exercise self-defense.¹¹⁶ Self-defense measures extend to those necessary to ensure the boarding team's safety during the visit, such as an initial safety inspection.

It bears repeating that for each of the five grounds listed above, any exercise of the right must be based on a "reasonable ground for suspecting" that the vessel falls into the named category. The right of visit is, like consent by the master, an exception to the noninterference rule in Article 110, not a basis for jurisdiction. Once the boarding team has addressed the initial safety issues, the boarding begins with verification of the ship's "right to fly its flag."¹¹⁷ If "suspicion remains after the documents have been checked," the boarding team "may proceed to a further examination on board the ship, which must be carried out with all possible consideration."¹¹⁸ When the basis for boarding is a suspicion that the vessel is stateless or of the same nationality as the enforcement vessel, that further examination may include inspection of the vessel's "main beam" or other location where the ship's official number should be stamped. The onboard examination typically continues until either there are no longer any reasonable grounds for suspecting the vessel's claim of nationality or the examination is completed, either confirming or dispelling the original suspicion.

If the evidence supports a finding that the vessel is indeed stateless or of the same flag as the enforcing State, that provides a basis for the assertion of jurisdiction. By contrast, if the ship's nationality is confirmed, consent to

114. In *U.S. v. Ricardo*, the court held that the Coast Guard could reasonably believe that a vessel that failed to fly a flag or otherwise exhibit its nationality, had English speakers on board, and was in proximity to the United States and bearing toward it was a U.S. vessel and the Coast Guard was justified in exercising a right of visit. *U.S. v. Ricardo*, 619 F.2d 1124, 1130 n.4 (5th Cir. 1980).

115. LOS Convention, *supra* note 66, art. 110(1)(c).

116. Craig H. Allen, *Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives*, 81 INTERNATIONAL LAW STUDIES 77, 82 n.48 (2006) (citing Security Council Resolution 221 as precedent).

117. LOS Convention, *supra* note 66, art. 110(2).

118. *Id.*

further enforcement action must be sought from the flag State unless a bilateral agreement with that State grants consent or the vessel is suspected of engaging in the universal crimes of piracy or the slave trade.

If the “suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them,” the boarding State must compensate the boarded vessel for any loss or damage from the right-of-visit boarding.¹¹⁹ The fact that suspicions turned out to be wrong does not mean that they were “unfounded,” as there may have been acts committed by the vessel that created or failed to allay those suspicions before sending over the boarding team.

D. Arguments for an Expanded Right of Visit

Like Article 22 of the 1958 Convention, in listing the bases for right-of-visit boardings, Article 110 of the Law of the Sea Convention lacks the critical “inter alia” found in the *chapeaux* of other Convention articles.¹²⁰ The omitted “inter alia” strongly suggests that the Article 110 list is exhaustive and that any additional bases for interference will have to be grounded on new international agreements or an amendment to the Article.¹²¹ The limited Article 110 visit regime has left some commentators unsatisfied. A few have argued for a more liberal interpretation of the elements of piracy to loosen the “private ends” and two-ship requirements in Article 101 of the Law of the Sea Convention.¹²² Others have argued that the right of visit in cases of suspected slave transport should similarly be given a more expansive interpretation to permit its extension to maritime human trafficking victims of debt bondage or forced prostitution.¹²³ Others espouse a broader version of non-flag State

119. *Id.* art. 110(3).

120. *See id.* arts. 87, 94(3). In enumerating the freedoms of the high seas, the *chapeau* to Article 87 includes an “inter alia” modifier, indicating the list is not exhaustive. In describing the duties of flag States, Article 94(3) follows the same approach. Thus, by omitting that qualifier from Article 110 and Article 19(2), the drafters signaled that the list is exhaustive.

121. The opening clause of Article 110 states, “Except where acts of interference derive from power conferred by treaty,” which forecloses additional exceptions based on customary law. *Id.* art. 110.

122. The U.S. Court of Appeals for the Ninth Circuit adopted a broad definition of “private ends” in *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 708 F.3d 1099, 1101–02 (9th Cir. 2013) (finding that violent acts by anti-whaling protesters on the high seas were for “private ends”).

123. *See, e.g.,* Menefee, *supra* note 112; Douglas MacFarlane, *The Slave Trade and the Right of Visit under the Law of the Sea Convention: Exploitation in the Fishing Industry in New Zealand and Thailand*, 7 *ASIAN JOURNAL OF INTERNATIONAL LAW* 94 (2017).

enforcement to meet the challenge of illegal, unreported, and unregulated fishing on the high seas.¹²⁴ Another suggestion calls for a new right of visit to enforce U.N. Security Council resolutions, even when the Council does not expressly provide such a right in the resolution.¹²⁵

Neither an amendment to Article 110 adding new grounds for a visit boarding nor general acceptance by States of the previously mentioned arguments for a more liberal interpretation of the existing rule appear likely in light of differing State interests. As Guilfoyle observed, “*many* states have flagged merchant vessels; *few* have the resources to conduct at-sea interdictions.”¹²⁶ That asymmetry, and perceptions of the States that do “have the resources to conduct at-sea interdictions,”¹²⁷ best explains why the majority of flag States are unlikely to loosen their grip on exclusive jurisdiction over vessels on the high seas through either an expanded right of visit or new crimes of universal jurisdiction.

Moreover, exclusive flag State jurisdiction over vessels on the high seas is considered one of the general principles of international law; any doubtful case involving a possible conflict between exclusive flag State jurisdiction and a lesser principle is likely to be resolved in favor of flag State jurisdiction.¹²⁸ Consistent with that general principle, recent international agreements and State practice rely instead on individual flag State consent, either through carefully drafted standing agreements or on an ad hoc basis.

V. SUGGESTED RESOLUTION ADDITION

To initiate a discussion of how a right of visit could enhance the effectiveness of select Security Council resolutions,¹²⁹ I suggest the following draft resolution language:

124. See, e.g., ROSEMARY G. RAYFUSE, *NON-FLAG STATE ENFORCEMENT IN HIGH SEAS FISHERIES* (2004).

125. The *Third Restatement* takes the position that “it may be suggested that the right to inspect and seize foreign ships be extended to ships carrying stolen nuclear materials or escaping terrorists, but the present international law on the subject is unclear.” *THIRD RESTATEMENT*, *supra* note 75, § 522 n.6.

126. DOUGLAS GUILFOYLE, *SHIPPING INTERDICTION AND THE LAW OF THE SEA* 25 (2009) (emphasis added).

127. *Id.*

128. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 12 (3d ed. 1999).

129. See Yusuke Saito, *How to Increase “Maximum Pressure” on North Korea By Reconsidering Options at Sea*, *OPINIO JURIS* (Dec. 18, 2018), <http://opiniojuris.org/2018/12/18/how-to-increase-maximum-pressure-on-north-korea-by-reconsidering-options-at-sea/> (discussing

The Security Council,

Recalling its previous relevant resolutions, including _____,

Determining that proliferation of nuclear, chemical, and biological weapons, and their means of delivery continues to constitute a threat to international peace and security,

Recognizing the legal and operational challenges that confront maritime patrol forces authorized by their member States to enforce Security Council sanctions on the high seas,

Acting under Article 41 of Chapter VII of the Charter of the United Nations,

1. *Decides* to adjust the measures imposed by resolution _____, by authorizing maritime patrol forces of member States cooperating in the implementation and enforcement of those measures to exercise, consistent with the 1982 U.N. Convention on the Law of the Sea, an expanded right of visit as follows:

[Within the seas bounded by (latitude/longitude)],¹³⁰ a warship or other duly authorized ship or aircraft clearly marked and identifiable as being on government service which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is justified in boarding the vessel if there is reasonable ground for suspecting that the vessel is engaged in activities prohibited by resolution _____.

If the suspicions prove to be unfounded and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage sustained.¹³¹

These provisions apply *mutatis mutandis* to military aircraft.

four possible measures to strengthen maritime sanctions, including authorizing member States to conduct MIO on the high seas, while acknowledging that Russia and China are unlikely to support such authority).

130. The bracketed clause would be optional, to address any concerns about expanding the boarding authority beyond the areas of principal concern.

131. The Security Council may also want to include some or all of the safeguards included in paragraph 8*bis* of the SUA Protocol. See 2005 SUA Protocol, *supra* note 73, ¶ 8*bis*.

As worded, the right of visit addition would not confer prescriptive or enforcement jurisdiction on the vessel. Flag States would still have primary jurisdiction over the vessel while on the high seas.¹³² If, however, the boarding uncovered evidence that the vessel was violating the sanctions regime, the flag State would have the option of authorizing the boarding State to take further action, as is the case with many of the existing multilateral boarding agreements.¹³³

Although the 2002 M/V *So San* incident demonstrates that on occasion a boarding State may be required to employ reasonable and necessary force to compel compliance with a right of visit boarding, such “police” force does not constitute the use of armed force.¹³⁴ Thus, any Security Council resolution authorizing a right of visit boarding to determine a vessel’s compliance with sanctions may be issued under Article 41 of the U.N. Charter.

VI. CONCLUSION

The 1982 Law of the Sea Convention’s high seas articles carefully balance the principles of freedom of navigation and exclusive flag State jurisdiction with the shared interest in ensuring effective enforcement of laws against certain serious offenses. The right of visit is a limited but invaluable compromise between those competing interests. Should the Convention’s right of visit be deemed inadequate to the needs of the twenty-first century, it incorporates a formal amendment process.¹³⁵ It also recognizes that States are free to enter into complementary international agreements, such as the

132. The modifier “primary” is chosen deliberately. The opening clause of Article 110 (“Except where acts of interference derive from powers conferred by treaty”) opened the door to treaty-based exceptions negotiated under the terms of the 1988 Narcotics Convention, Convention on Transnational Organize Crime, Proliferation Security Initiative, 2005 SUA Convention Protocol, and Straddling Fish Stocks Agreement. Those agreements reflect the shifting balance between the principle of freedom of navigation and the need to enforce the rule of law at sea.

133. See, e.g., U.N. Drugs Convention, *supra* note 78, art. 17(3)

A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

134. See Allen, *supra* note 116, at 122 n.20 (citing Myres S. McDougal, *Authority to Use Force on the High Seas*, 61 INTERNATIONAL LAW STUDIES 551, 557–58 (1979)).

135. LOS Convention, *supra* note 66, art. 312.

Straddling Fish Stocks Agreement and the 2005 Protocol to the SUA Convention. Dissatisfied with those options, some commentators have proposed a bold *de lege ferenda* vision of non-flag State enforcement on the high seas.¹³⁶ The short answer to such exhortations is that the text of Article 110 forecloses any extensions of the right of visit by customary law. Moreover, any treaties or bilateral agreements providing an expanded basis for boarding will bind only the parties to those agreements. However, Security Council resolutions under Chapter VII would bind all States.

Naval forces deployed across the world's seas to enforce sanctions imposed by the Security Council must surmount any number of operational and legal challenges. Perhaps, weary of seeing its Chapter VII resolutions flouted, the Security Council will be moved to adopt a future resolution that authorizes a limited right of visit on the high seas. Should it be so moved, the language suggested above could serve as a useful starting point.

136. See *supra* notes 123–25 and accompanying text.