

# COUNTERING PROLIFERATION: WMD ON THE MOVE

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Today, the Cold War has disappeared but thousands of those weapons have not. In a strange turn of history, the threat of global nuclear war has gone down, but the risk of a nuclear attack has gone up.<sup>1</sup>

— President Barack Obama, April 5, 2009

## I. INTRODUCTION

My topic is counter-proliferation in the context of maritime interdiction. In particular, I'd like to address the recent UN Security Council Resolution (UNSCR) 1929,<sup>2</sup> which is generally viewed as having increased the pressure on Iran to stop its nuclear program. With a focus on the maritime perspective, we will look at whether UNSCR 1929 has, in fact, succeeded in increasing the pressure on Iran to steer its nuclear program toward compliance with international norms.

The current Administration is extremely serious about its counter-proliferation efforts. In his April 2009 speech in Prague, President Obama emphasized "America's commitment to seek the peace and security of a world without nuclear weapons."<sup>3</sup> But, in that same speech, he spoke of the reality that, despite the end of the Cold War and its associated arms race, "the risk of a nuclear attack has gone up."<sup>4</sup>

The counter-proliferation field includes a number of dimensions. Legal regimes exist to (1) stop the development of weapons of mass destruction (WMD), through treaties such as the Non-Proliferation Treaty;<sup>5</sup> (2) cease the testing of WMD, through the Limited Test Ban Treaty<sup>6</sup> and the Comprehensive Test Ban Treaty;<sup>7</sup> (3) reduce the stockpiles of WMD, through the New START Treaty;<sup>8</sup> (4) secure existing stockpiles, through the

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<sup>1</sup> Barack Obama, U.S. President, Prague Address on Nuclear Weapons (Apr. 5, 2009) [hereinafter Prague Address] (video available at <http://www.whitehouse.gov/video/The-President-in-Prague#transcript>; for the transcript, follow "Read the Transcript" hyperlink on the same page).

<sup>2</sup> S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010).

<sup>3</sup> Prague Address, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Non-Proliferation Treaty].

<sup>6</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

<sup>7</sup> Comprehensive Nuclear-Test-Ban Treaty, *opened for signature* Sept. 24, 1996, S. TREATY DOC. NO. 105-28, 35 I.L.M. 1439.

<sup>8</sup> Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive

Convention on the Physical Protection of Nuclear Material;<sup>9</sup> (5) eliminate stockpiles of chemical weapons, through the Chemical Weapons Convention;<sup>10</sup> (6) cease the manufacture and facilitate the destruction of biological and toxin weapons, through the Biological and Toxin Weapons Convention;<sup>11</sup> and (7) destroy existing surplus materials, through bilateral efforts, such as the multi-year, multi-billion dollar Nunn-Lugar Cooperative Threat Reduction (CTR) Program dating back to the early 1990s, and funded consistently by the U.S. Congress.<sup>12</sup>

I would also like to point out that, during his time of distinctive service in the Department of Defense, my friend and colleague on this panel, Professor Jack Beard, was responsible for initiating groundbreaking international agreements that provided the foundation for some of the earliest and most essential CTR assistance efforts in Russia and other former Soviet Republics, thereby bringing the Nunn-Lugar program to life.<sup>13</sup> Lastly, the UN Security Council has declared that WMD proliferation is a threat to international peace and security and, through its adoption of UNSCR 1540,<sup>14</sup> has required member states to adopt domestic legislation and import/export regulations to prevent WMD from getting into the wrong hands. Since the adoption of UNSCR 1540, the Security Council has expanded the international effort to

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Arms, U.S.-Russ., Apr. 8, 2010, S. TREATY DOC. NO. 111-5. The New START Treaty has been passed by the Senate Foreign Relations Committee. *See Key Senate Committee Passes Nuclear Arms Treaty*, CNN (Sept. 16, 2010), <http://www.cnn.com/2010/POLITICS/09/16/senate.start.treaty/>.

<sup>9</sup> Convention on the Physical Protection of Nuclear Material, *entered into force* Feb. 8, 1997, T.I.A.S. 11080 (codified in the U.S. as Convention on the Physical Protection of Nuclear Material Implementation Act, Pub. L. No. 97-351, 96 Stat. 1663 (codified as amended in scattered sections of 18 U.S.C.)).

<sup>10</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *entered into force* Apr. 29, 1997, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45 [hereinafter Chemical Weapons Convention].

<sup>11</sup> The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *entered into force* Mar. 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention].

<sup>12</sup> Soviet Nuclear Threat Reduction Act of 1991, Pub. L. No. 102-228, 105 Stat. 1691 (codified at 22 U.S.C. § 2551). In its first year, the Nunn-Lugar Act authorized the use of four hundred million dollars to assist the Soviet Union and its “successor entities” with efforts “to (1) destroy nuclear weapons, chemical weapons, and other weapons, (2) transport, store, disable, and safeguard weapons in connection with their destruction, and (3) establish verifiable safeguards against the proliferation of such weapons.” *Id.* § 212(b).

<sup>13</sup> *See, e.g.*, Agreement Concerning the Safe and Secure Transportation, Storage and Destruction of Weapons and the Prevention of Weapons Proliferation, with Implementing Agreements, U.S.-Russ., June 17, 1992, Temp. State Dep’t No. 05-168.

<sup>14</sup> S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

thwart WMD development by adopting far-reaching measures targeted at particular states that pose a high risk for proliferation. It is this new effort to focus attention on individual states that has brought us where we are today.

I would like to focus on a particularly vexing manifestation of the WMD problem—WMD “on the move”—and high seas interdiction as a response to that threat. Although the Department of Defense has a role—and certainly a major interest—in all aspects of the non-proliferation problem, given the need for military forces to intercept WMD shipments in transit through the global commons, WMD “on the move” is an area of concern that the Department of Defense is particularly competent to address. Stated another way, the Department’s role in addressing the reality to which President Obama referred in his April 2009 speech—that the WMD risk is increasing, not decreasing<sup>15</sup>—is indeed a prominent one.

The task of halting the flow of proliferation material and technology, and keeping them out of the hands of terrorists and rogue nations, is daunting, to say the least. Approximately ninety percent of international cargo moves by sea,<sup>16</sup> and vast spans of the world’s oceans remain unmonitored. Moreover, it is believed that no more than ten percent of shipped cargoes are opened and inspected when in port.<sup>17</sup> In early 2004 the world learned that Dr. A.Q. Khan—the chief architect of Pakistan’s nuclear weapons program—and his global network had been selling nuclear weapons technology and equipment to North Korea, Libya, and Iran on the black market for more than fifteen years, using components obtained in Europe, the United Arab Emirates, and Malaysia.<sup>18</sup> Although we eventually became aware of these activities, there may be many others that will never be discovered.

Non-proliferation and counter-proliferation strategies must account for the fact that arms producers and sellers—both state and private actors—are players in a competitive and wildly lucrative global market, in which the unscrupulous player stands to reap a fortune.

Efforts to stop proliferation through high seas interdiction, however, are not a hopeless endeavor. With good intelligence and careful legal thinking, maritime interdiction can yield results, as seen in 2003 in the case of the

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<sup>15</sup> Prague Address, *supra* note 1.

<sup>16</sup> Michael Lyon Baker, *Toward an African Maritime Economy: Empowering the African Union to Revolutionize the African Maritime Sector*, 64 NAVAL WAR C. REV., no. 2, 2011 at 39, 41.

<sup>17</sup> This figure specifically refers to U.S. port inspections. See ISSUES IN TERRORISM AND HOMELAND SECURITY: SELECTIONS FROM CQ RESEARCHER 317 (Jerry Westby et al. eds., 2d ed. 2011).

<sup>18</sup> David Rohde & David E. Sanger, *Key Pakistani Is Said to Admit Atom Transfers*, N.Y. TIMES, Feb. 2, 2004, at A1.

cargo ship, M/V (motor vessel) *BBC China*. Intelligence services (including those of the United States and the United Kingdom) correctly believed that the *BBC China* was transferring centrifuges for nuclear weapons production to Libya in October 2003.<sup>19</sup> Although an actual boarding at sea was not required because the German government was able to convince the German shipowner to divert the vessel to Italy where the cargo was off-loaded, the case is largely credited with having brought Libya's nuclear program to a halt.<sup>20</sup> Other cases, where actual boardings were conducted, have yielded similar results.<sup>21</sup>

It is worth noting that, if the *BBC China* situation of 2003 were to occur today, we would have an additional legal tool at our disposal. In particular, we have an agreement with the country that, at the time, was the flag state (i.e., state of registry) of the *BBC China*: Antigua and Barbuda.<sup>22</sup> Under that agreement, Antigua and Barbuda agreed to a reciprocal process for granting flag state consent for boarding each other's vessels within a very short period of time.<sup>23</sup> The United States has concluded eleven such agreements that establish expedited procedures for obtaining flag state consent; together, these agreements include the flag states that are responsible for the majority of the world's shipping tonnage.<sup>24</sup>

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<sup>19</sup> Christopher Clary, A. Q. Khan's Nuclear Hubris, 8 GLOBAL DIALOGUE, no. 1/2, 2006 at 130, 130.

<sup>20</sup> See Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 N.Y.U. J. INT'L L. & POL. 937, 990 (2007).

<sup>21</sup> In November 2001, Pentagon officials announced that U.S. forces would stop and board cargo ships suspected of helping Al Qaeda leaders flee from Afghanistan. In July 2002, an operation involving four NATO member states, not including the United States, intercepted a ship in the Gulf of Oman that was transporting four suspected Al Qaeda terrorists. This was achieved by the ongoing NATO naval operation "Active Endeavour." *Operation Active Endeavour*, NATO, [http://www.nato.int/cps/en/natolive/topics\\_7932.htm](http://www.nato.int/cps/en/natolive/topics_7932.htm) (last visited Dec. 19, 2011). Other examples include the Israeli seizure of the ship *Karine A*; the Spanish boarding of the *So San* cargo vessel; and the diversion of the *BBC China* to an Italian port. James Bennett, *Seized Arms Would Have Vastly Extended Arafat Arsenal*, N.Y. TIMES (Jan. 12, 2002), <http://www.nytimes.com/2002/01/12/world/seized-arms-would-have-vastly-extended-arafat-arsenal.html?pagewanted=all&src=pm>; Craig H. Allen, *The Limits of Intelligence in Maritime Counterproliferation Operations*, 60 NAVAL WAR C. REV., no. 1, 2007 at 35, 42-43.

<sup>22</sup> Agreement Between the Government of the United States of America and the Government of Antigua and Barbuda Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea, U.S.-Ant. & Barb., Apr. 26, 2010, available at <http://www.state.gov/documents/organization/147182.pdf>.

<sup>23</sup> *Id.* art. 4(3).

<sup>24</sup> The United States has concluded such agreements with various states, including Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, and St. Vincent and the Grenadines. *Ship Boarding Agreements*, U.S. DEP'T STATE,

## II. DOMINANT PRINCIPLES IN COUNTERING WMD & LEGAL LINKAGES

When discussing high seas interdiction, it is best to begin with an understanding of two very important international law principles: state sovereignty and the non-interference of vessels in international waters. These two principles find their bases, respectively, in the United Nations Charter (UN Charter) and in customary and treaty-based international law, making them key to any regime under which states' actions are to be respected as compliant with international law.

Although the UN Charter is sometimes thought to have limited the dominance of states, it is also true that the Charter respects state sovereignty,<sup>25</sup> provides for non-interference in a state's domestic matters,<sup>26</sup> and is premised on working through the sovereign state system to accomplish its goals.<sup>27</sup> Though perhaps a simplification, one might say that the United Nations and sovereign states have reached equilibrium—forging a partnership, or a practical, problem-solving linkage.

This linkage between the United Nations and sovereign states is illustrated time and again in the context of major international instruments for non-proliferation. For example, the effectiveness of many international commitments is dependent upon the enforcement of domestic criminal laws and domestic import/export laws.<sup>28</sup> International commitments that rely on domestic enforcement in the field of non-proliferation include: the Chemical Weapons Convention;<sup>29</sup> the 2005 Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation;<sup>30</sup>

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<http://www.state.gov/t/isn/c27733.htm> (last visited Dec. 19, 2011). Even back in 2007, when such agreements had been concluded with only six of these eleven countries, one expert pointed out that these flag state countries “account for more than 60 percent of the world's commercial vessel tonnage.” CRAIG H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 53 (2007).

<sup>25</sup> U.N. Charter pmbl.

<sup>26</sup> *Id.* art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

<sup>27</sup> *Id.* pmbl.

<sup>28</sup> Domestic import/export laws entail inspections, licenses, and duties.

<sup>29</sup> Chemical Weapons Convention, *supra* note 10.

<sup>30</sup> Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, Nov. 1, 2005, IMO Doc. LEG/CONF.15/21 [hereinafter 2005 Protocol], *available at* <http://www.state.gov/t/isn/trty/81727.htm>. The Protocol was preceded by a 1988 Convention. Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221. The 2005 Protocol

the Proliferation Security Initiative;<sup>31</sup> the Global Initiative to Combat Nuclear Terrorism;<sup>32</sup> UNSCR 1540,<sup>33</sup> 1718,<sup>34</sup> 1737,<sup>35</sup> 1747,<sup>36</sup> 1803,<sup>37</sup> 1874,<sup>38</sup> and 1929;<sup>39</sup> the 1968 Treaty on Non-Proliferation of Nuclear Weapons;<sup>40</sup> export control regimes;<sup>41</sup> and the Biological and Toxin Weapons Convention.<sup>42</sup>

In terms of stopping proliferation, none of these international proliferation-related instruments create new enforcement authorities. All of these instruments rely on states parties to apply domestic controls, within their respective home countries, enforcing these international legal obligations. Why is this so? Respect for sovereignty is one reason—these agreements are crafted to avoid encroaching on the sovereignty of the individual state party. A second reason relates to the fact that WMD proliferation is, in many ways, just a form of illegal trade or black market activity. Regulating trade is something that individual states have the capability to accomplish through domestic legislation; this is equally true for the illicit trade of WMD-related materials. Sovereign states are well equipped to “give life” to international proliferation-related agreements by strengthening their domestic laws. Indeed, these international instruments do not purport to substitute for domestic responsibility to establish new enforcement authorities—a key point. Most international laws are premised on sovereign states using their own domestic laws to “make good” on their

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modified the 1988 Convention by requiring states parties to criminalize the transportation of WMD and related items. 2005 Protocol, *supra*, art. 3*bis*. The 2005 Protocol also contains a provision for an expedited process for obtaining flag state consent. *Id.* art. 8*bis*.

<sup>31</sup> See *Proliferation Security Initiative*, U.S. DEP’T STATE, <http://www.state.gov/t/isn/c10390.htm> (last visited Dec. 19, 2011) (summarizing the purposes and goals of the Proliferation Security Initiative).

<sup>32</sup> See *The Global Initiative to Combat Nuclear Terrorism*, U.S. DEP’T STATE, <http://www.state.gov/t/isn/c18406.htm> (last visited Dec. 19, 2011) (providing basic details of the initiative and its mission).

<sup>33</sup> S.C. Res. 1540, *supra* note 14.

<sup>34</sup> S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

<sup>35</sup> S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006).

<sup>36</sup> S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007).

<sup>37</sup> S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

<sup>38</sup> S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009).

<sup>39</sup> S.C. Res. 1929, *supra* note 2.

<sup>40</sup> Non-Proliferation Treaty, *supra* note 5.

<sup>41</sup> See *Multilateral Export Control Regimes*, BUREAU OF INDUS. AND SEC.: U.S. DEP’T COM., <http://www.bis.doc.gov/policiesandregulations/multilateralexportregimes.htm> (last visited Dec. 19, 2011) (listing and describing several export control regimes).

<sup>42</sup> Biological Weapons Convention, *supra* note 11.

international commitments, and this is no better illustrated than in the non-proliferation field.

The second very important principle—one that is applied to travelers of the world's oceans—is the non-interference principle. The overarching theme of non-interference (and its companion principle of freedom of navigation) is that vessels at sea are to be left generally undisturbed and subject only to the jurisdiction of their respective flag states. This generally means that a patrolling state, or a potential interdicting state, may only board a vessel in international waters with the consent of the flag state. Although there are exceptions that will be addressed below, this non-interference principle is fundamental to the Law of the Sea, which can be traced back to its famous historical advocate, Hugo Grotius, in his 1609 work entitled “Mare Liberum,” or “The Freedom of the Seas.”<sup>43</sup>

It is also worth noting that high seas trade is important for the security and economic well-being of the state. Thus, the right of nations to navigate freely on the high seas supports the concept of state sovereignty—the two principles, in fact, reinforce one another.

### III. MARITIME INTERDICTION ON THE HIGH SEAS: A BALANCE OF INTERESTS

Where does this discussion leave us with regard to maritime interdiction? In light of the non-interference principle, how can we justify maritime interdiction in our efforts to stop WMD proliferation?<sup>44</sup>

The problem is that maritime interdiction is not a favored activity—as noted above, it seems at odds with the principles of non-interference, state sovereignty, and freedom of navigation—and a significant hurdle must be overcome to justify interdiction at sea.

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<sup>43</sup> HUGO GROTIUS, *THE FREEDOM OF THE SEAS, OR, THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE* 30 (James Brown Scott ed., Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1609).

<sup>44</sup> See United Nations Convention on the Law of the Sea art. 58, para. 1, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter 1982 Law of the Sea Convention], with respect to the application of navigational freedoms in the exclusive economic zone (“In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight . . .”); see also S.C. Res. 1540, *supra* note 14, paras. 2–3 (deciding that all states shall adopt and enforce effective laws to prohibit non-state actors from developing, acquiring, or transporting WMD; and shall establish domestic controls to control the proliferation of WMD). S.C. Res. 1540 also calls upon all states to take cooperative action to prevent illicit trafficking in accordance with their national legal authorities and consistent with international law. *Id.* para. 3(c).

Certain circumstances clearly permit interdiction of vessels at sea. For example, interdiction is acceptable if one of several situations exists:

- A flag state consents to a boarding of a vessel. This is called “flag state consent,” and, because this class of boarding is entirely consistent with flag states’ exclusive jurisdiction over boarded vessels,<sup>45</sup> it is the most favored method for boarding.
- A master of a vessel (acting on behalf of the owner, not the flag state) consents to a boarding of a vessel. However, even if such consent is obtained, the patrolling State may only inspect what the master permits, and in no case may the master allow the patrolling State to seize anything from the vessel being inspected (unless some other grounds exist—for example, finding a “ticking bomb” that may justify the application of self-defense under Article 51 of the UN Charter), because only flag states have the authority to exercise this aspect of jurisdiction over the vessels of their States.<sup>46</sup> Thus, a master’s consent is associated with a very limited authority for a boarding. Vessels boarded with a master’s consent are usually boarded for the purpose of information-gathering. As a routine practice of the U.S. Department of Defense, such boardings are usually conducted with minimum impact on the master’s tight schedule.<sup>47</sup>
- A patrolling vessel has a reasonable belief that a target vessel is engaged in prohibited activities included in Article 110 of the 1982 UN Convention on the Law of the

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<sup>45</sup> See 1982 Law of the Sea Convention, *supra* note 44, art. 92, para. 1 (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”).

<sup>46</sup> U.N. Charter art. 51.

<sup>47</sup> ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 3.11.2.5.2 (A.R. Thomas & James C. Duncan eds.) (Naval War College International Law Studies, Vol. 73, 1999) [hereinafter ANNOTATED SUPPLEMENT], as updated by DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (Naval Warfare Pub. 1-14M, 2007).

Sea, such as the slave trade, piracy, or statelessness.<sup>48</sup> None of these activities are, on their face, relevant to the proliferation problem set, but, occasionally, statelessness is applicable where proliferators attempt to hide their identities, refuse to display their flags, or give confusing or contradictory responses to requests for identification.<sup>49</sup>

In the scenarios described above, peacetime boardings are permissible under international law. Indeed, boardings on the basis of one of these three concepts—flag state consent, master's consent, and reasonable belief of engagement in prohibited activities under the Law of the Sea Convention (e.g., slave trade, piracy, or statelessness)—comprise most peacetime boardings.

#### IV. HOW THE RULES CAN CHANGE

Having described the general law of maritime interdiction, let me now emphasize that these rules are not set in stone; there are exceptions, although most of them exist only in extraordinary circumstances. These rules could be called “game changers”—circumstances that potentially change the rules of maritime interdiction. They are:

- Armed conflict—the right to visit, search, blockade, etc.<sup>50</sup>
- Self-defense<sup>51</sup>—the 1962 Cuban blockade might be an example of this.<sup>52</sup>
- Slowly evolving practice of States—the British boarding of suspected slavery ships for 150 years before acceptance by the international community demonstrates the impact

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<sup>48</sup> 1982 Law of the Sea Convention, *supra* note 44, art. 110.

<sup>49</sup> The suspect nationality of the *So San* provided justification for the Spanish Navy to board the ship. Amitai Etzioni, *Tomorrow's Institution Today: The Promise of the Proliferation Security Initiative*, 88 FOREIGN AFF., no. 3, 2009 at 7, 7.

<sup>50</sup> See ANNOTATED SUPPLEMENT, *supra* note 47, §§ 7.6–7.

<sup>51</sup> U.N. Charter art. 51.

<sup>52</sup> See Myres S. McDougal, Editorial Comment, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 603 (1963) (noting that the quarantine could be reasonably seen as “in accord with traditional general community expectations about the requirements of self-defense”).

of the moral imperative on the development of international law.<sup>53</sup>

Although these circumstances could exist, for purposes of this discussion, let's assume that they do not. For example, given the high stakes in the non-proliferation field, it is unrealistic to wait 150 years for the law to change through state practice. In that light, action through the UN Security Council presents the only reasonable means for changing the rules of maritime interdiction. The Security Council is empowered by Article 39 of the UN Charter to determine the existence of a threat to international peace and security and to impose various measures to restore such peace and security.<sup>54</sup>

For maritime interdiction, action by the UN Security Council can take one of two basic forms—the first being sanctions in accordance with Chapter VII authority to conduct maritime interdiction operations (hereinafter MIO), and the second being sanctions that are not supported by MIO. It is important to determine which of these tools is available for dealing with the particular problem of proliferation.

Sanctions expressly supported by Chapter VII MIO authority have been clearly present in at least six historical cases: Southern Rhodesia,<sup>55</sup> the Iraq/Kuwait crisis,<sup>56</sup> Haiti,<sup>57</sup> Sierra Leone,<sup>58</sup> the Balkan Crisis in the Adriatic,

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<sup>53</sup> Beginning in the early nineteenth century, the British Navy boarded ships suspected of engaging in the slave trade. See Louis B. Sohn, *Peacetime Use of Force on the High Seas*, in 64 INT'L L. STUD., THE LAW OF NAVAL OPERATIONS 38, 44–45 (Horace B. Robertson, Jr. ed., 1991). Such boardings were widely condemned, until the 1958 High Seas Convention included slavery as a justification to board. See *id.* at 55–57.

<sup>54</sup> U.N. Charter art. 39.

<sup>55</sup> S.C. Res. 217, para. 8, U.N. Doc. S/RES/217 (Nov. 20, 1965) (imposing a non-mandatory economic embargo on Southern Rhodesia that applied particularly to arms and oil); S.C. Res. 221, para. 5, U.N. Doc. S/RES/221 (Apr. 9, 1966) (authorizing maritime interdiction when it called “upon the Government of the United Kingdom . . . to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia”).

<sup>56</sup> S.C. Res. 661, paras. 3–4, U.N. Doc. S/RES/661 (Aug. 6, 1990) (imposing a mandatory economic embargo on Iraq). Kuwait sent a request to the United Nations for international assistance to enforce the economic embargo based on the principle of collective self-defense. In response, the UN authorized maritime interdiction, calling

upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in Resolution 661 (1990).

S.C. Res. 665, para. 1, U.N. Doc. S/RES/665 (Aug. 25, 1990).

and Libya.<sup>59</sup> The resolutions pertaining to the Balkan Crisis in the early 1990s serve as a good case in point, demonstrating the importance of the Security Council's particular choice of wording. For example, consider these key provisions:

—UNSCR 713: mandatory arms embargo

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<sup>57</sup> S.C. Res. 841, para. 5, U.N. Doc. S/RES/841 (June 16, 1993) (imposing mandatory arms embargo on Haiti). The following year, the UN authorized maritime interdiction under Chapter VIII of the Charter of the United Nations by calling

upon Member States cooperating with the legitimate Government of Haiti, acting nationally or through regional agencies or arrangements, to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to ensure strict implementation of the provisions of the present resolution and earlier relevant resolutions, and in particular to halt outward as well as inward maritime shipping as necessary in order to inspect and verify their cargoes and destinations and also to ensure that the Committee established pursuant to resolution 841 (1993) is kept regularly informed.

S.C. Res. 917, para. 10, U.N. Doc. S/RES/917 (May 6, 1994).

<sup>58</sup> S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997). S.C. Res. 1132 imposed a mandatory arms embargo on Sierra Leone and authorized maritime interdiction when it "authorized" the Economic Community of Western African states,

cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related [material] of all types, including, where necessary and in conformity with applicable international standards, by halting inward maritime shipping in order to inspect and verify their cargoes and destinations.

*Id.* para. 8.

<sup>59</sup> S.C. Res. 1973, U.N. Doc. S/Res/1973 (Mar. 17, 2011). S.C. Resolution 1973 imposed a mandatory arms embargo on Libya and authorized maritime interdiction by calling

upon all Member States, in particular States of the region, acting nationally or through regional organizations or arrangements, in order to ensure strict implementation of the arms embargo established by paragraphs 9 and 10 of resolution 1970 (2011), to inspect in their territory, including seaports and airports, and on the high seas, vessels and aircraft bound to or from the Libyan Arab Jamahiriya, if the State concerned has information that provides reasonable grounds to believe that the cargo contains items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of resolution 1970 (2011) as modified by this resolution, including the provision of armed mercenary personnel, *calls upon* all flag States of such vessels and aircraft to cooperate with such inspections and authorizes Member States to use all measures commensurate to the specific circumstances to carry out such inspections.

*Id.* para. 13.

6. [The UN Security Council *d*]ecides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia;<sup>60</sup>

—UNSCR 787: maritime interdiction

12. Acting under Chapters VII and VIII of the Charter of the United Nations, [the UN Security Council] *calls upon* States, acting nationally or through regional agencies or arrangements . . . to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992);<sup>61</sup>

—UNSCR 820: extension of interdiction operations

28. [The UN Security Council *d*]ecides to prohibit all commercial maritime traffic from entering the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) except when authorized on a case-by-case basis by the Committee established by resolution 724 (1991) or in case of *force majeure*.<sup>62</sup>

Notice the stepwise, measured approach of the Security Council in adopting these resolutions. The resolutions first imposed only an embargo. Subsequent resolutions were adopted, authorizing maritime interdiction

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<sup>60</sup> S.C. Res. 713, para. 6, U.N. Doc. S/RES/713 (Sept. 25, 1991); *see also* S.C. Res. 757, para. 4, U.N. Doc. S/RES/757 (May 30, 1992) (establishing a total embargo on imports to Yugoslavia by UN member states).

<sup>61</sup> S.C. Res. 787, para. 12, U.N. Doc. S/RES/787 (Nov. 16, 1992).

<sup>62</sup> S.C. Res. 820, para. 28, U.N. Doc. S/RES/820 (Apr. 17, 1993); *see also id.* para. 29 (“[The UN Security Council *r*]eaffirms the authority of States acting under paragraph 12 of resolution 787 (1992) to use such measures commensurate with the specific circumstances as may be necessary under the authority of the Security Council to enforce the present resolution and its other resolutions, including in the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro).”).

pursuant to Chapter VII of the UN Charter, in response to noncompliance with the embargo.

The language cited above (particularly, “to halt all inward and outward maritime shipping”) is typical phraseology for an enforceable embargo through maritime operations. Although this language is not the only language that could be used, the Security Council has chosen to authorize enforcement measures this way in the past. The language is specific, leaving little doubt that nonconsensual interdiction is authorized. Thus, states are not limited to flag state or master’s consent as the only possible bases for interdiction.

So, is this the situation that we have with respect to Iran? Do the UN Security Council’s resolutions pertaining to Iranian vessels impose an MIO-enforceable embargo? No, they do not. In fact, among all the Security Council resolutions currently pertaining to WMD proliferation, none of them contain the enforcement language found in the five previous UNSCR-based MIO operations that provided the tools states needed to enforce sanctions and embargoes.

To illustrate, we next examine the key operative paragraphs of UNSCR 1929 of June 2010—the most forward-leaning of four UNSCRs pertaining to Iran.<sup>63</sup>

#### A. UNSCR 1929

These are two key operative provisions of UNSCR 1929, which were adopted in response to mounting concerns surrounding transport of proliferation-related materials by Iranian vessels:

15. [The UN Security Council] . . . *calls upon* all States to cooperate in [inspections of vessels on the high seas with the consent of the flag state] if there is information that provides reasonable grounds to believe the vessel is carrying [prohibited items] . . . ;<sup>64</sup>
16. [The UN Security Council *d*]ecides to authorize all States to, and that all States shall, seize and dispose

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<sup>63</sup> S.C. Res. 1929 expands the arms embargo to Iran imposed by previous Security Council resolutions from WMD-related materials to major conventional weapons. John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 104 AM. J. INT’L L. 489, 517–18 (2010).

<sup>64</sup> S.C. Res. 1929, *supra* note 2, para. 15.

of . . . [prohibited items] . . . that are identified in inspections pursuant to paragraphs 14 or 15 . . . .<sup>65</sup>

Although paragraph 15 of UNSCR 1929 fully recognizes that naval ships of UN member states may be operating at sea for counter-proliferation purposes, this provision does little more than permit what was previously recognized in international law: flag state consent boarding. The resolution bears little resemblance to the language from the resolutions pertaining to the Balkan Crisis in the Adriatic.<sup>66</sup> Unlike the resolutions adopted in response to the Balkan Crisis, UNSCR 1929 simply calls upon flag states to cooperate in providing flag state consent.

Thus, from a maritime interdiction standpoint, UNSCR 1929 lacks key language that we would like to see, and does not give us much more than existed before the resolution was adopted. This means that, for the most part, UNSCR 1929 maritime provisions fall within the mainstream maritime-interdiction paradigm—i.e., they do not authorize the enforcement of sanctions by forceful means.

However, there is one very promising, yet unresolved, possibility raised by the text of UNSCR 1929 that could expand the rules beyond the present norms. Because the boarding envisioned in UNSCR 1929 is based on consent, a flag state has the authority to say “no” to a request, or even withdraw its consent after the boarding has been initiated. This would be consistent with the general rule discussed above regarding flag states’ exclusive jurisdiction over boarded vessels.<sup>67</sup> However, what happens if prohibited material is found, pursuant to a consensual boarding under paragraph 15, but, as a result of that discovery, the flag state subsequently withdraws its consent? What obligation does the boarding party then have under paragraph 16? Must the boarding party leave the vessel because the boarding is based on flag state consent that has now been withdrawn, or does paragraph 16 raise an independent right, or even an “obligation,” to seize the prohibited material? Given that the Security Council typically uses the term “decides” to create a mandatory obligation,<sup>68</sup> does this mean paragraph 16

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<sup>65</sup> *Id.* para. 16.

<sup>66</sup> *See supra* notes 60–62 and accompanying text.

<sup>67</sup> *See supra* note 45 and accompanying text.

<sup>68</sup> Some paragraphs use the word “decides.” *See, e.g.*, S.C. Res. 1929, *supra* note 2, paras. 7–13. “Decides” impliedly invokes Chapter V, Article 25, of the UN Charter; *see also* Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73, 82 (1998) (“[W]hen the Council intends a provision to be mandatory, the resolution contains . . . the word ‘decides.’”). The UN Charter provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in

creates an obligation for boarding states, even where a flag state has withdrawn its consent? Does it make a difference that UNSCR 1929 was adopted under Article 41,<sup>69</sup> which does not permit the use of “armed force”?<sup>70</sup> Does Article 41’s prohibition on armed force preclude the use of any force, whatsoever, or only some forms of it? Does nonconsensual seizure constitute armed force, or is it more akin to “police force,” which, according to some commentators,<sup>71</sup> is not prohibited by Article 41? These are the types of questions that come up in the context of UNSCR interpretation, and there is little or no guidance to help us resolve them.

Although some may characterize UNSCR 1929 as being weak,<sup>72</sup> the Resolution does in fact add to the law of maritime interdiction, and the merits of the following advances should be recognized:

- Embargo of major arms: UNSCR 1929 expands the UNSCR 1747 embargo of conventional arms.<sup>73</sup> For example, UNSCR 1747 prohibited conventional arms shipments exported *from Iran*; UNSCR 1929 expands this

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accordance with the present Charter.” U.N. Charter art. 25. When the Security Council “calls upon” States to take certain actions, this is generally viewed as non-mandatory language. See Michael Byers, Note and Comment, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT’L L. 526, 532 (2004) (finding the “calls upon” language to be recommendatory). But see James Fry, *Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications*, 29 MICH. J. INT’L L. 197, 229–30 (2008) (noting that commentators seem to be split on whether “calls upon” is recommendatory or mandatory and concluding that it is mandatory).

<sup>69</sup> S.C. Res. 1929, *supra* note 2, pmb1.

<sup>70</sup> U.N. Charter art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions . . .”).

<sup>71</sup> See, e.g., Kathryn S. Elliott, Note, *The New World Order and the Right of Self-Defense in the United Nations Charter*, 15 HASTINGS INT’L & COMP. L. REV. 55, 68 (1991) (arguing that UN article 39 empowers the UN to undertake measures under articles 41 and 42 that include police action).

<sup>72</sup> See Neal Conan, *New Round of Iran Sanctions Satisfy Few*, NAT’L PUB. RADIO (June 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=127743438>.

<sup>73</sup> S.C. Res. 1929, *supra* note 2, para. 8 (“[The UN Security Council d]ecides that all States shall prevent the direct or indirect supply, sale or transfer to Iran, from or through their territories or by their nationals or individuals subject to their jurisdiction, or using their flag vessels or aircraft, and whether or not originating in their territories, of any battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems as defined for the purpose of the United Nations Register of Conventional Arms, or related materiel, including spare parts, or items as determined by the Security Council or the Committee established pursuant to resolution 1737 (2006) . . .”).

conventional arms prohibition to conventional arms shipments (major conventional arms only) *to Iran*.

- Travel: UNSCR 1929 expands the applicability of UNSCR 1803 by increasing the list of individuals who may not travel due to their technical expertise in WMD development.<sup>74</sup>
- Asset freeze: UNSCR 1929 expands the applicability of UNSCR 1737 by including the entities of the Islamic Republic of Iran Shipping Line (IRISL).<sup>75</sup> The freeze includes “financial or other assets or economic resources on their territories”<sup>76</sup> raising the question of whether this provision is applicable to IRISL vessels that dock at the ports of member States; if so, this may have the practical effect of barring IRISL vessels from conducting trade.
- Boardings: UNSCR 1929 creates a moral obligation for a flag state to permit a boarding.<sup>77</sup>
- Disposition: UNSCR 1929 specifically permits seizures, thus removing the concerns associated with past

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<sup>74</sup> *Id.* para. 10 (“[The UN Security Council *d*]ecides that all States shall take the necessary measures to prevent the entry into or transit through their territories of individuals designated in Annex C, D and E of resolution 1737 (2006), Annex I of resolution 1747 (2007), Annex I of resolution 1803 (2008) and Annexes I and II of this resolution, or by the Security Council or the Committee pursuant to paragraph 10 of resolution 1737 (2006), except where such entry or transit is for activities directly related to the provision to Iran of items in subparagraphs 3(b)(i) and (ii) of resolution 1737 (2006) . . .”).

<sup>75</sup> *Id.* para. 19 (“[The UN Security Council *d*]ecides that the measures specified in paragraphs 12, 13, 14 and 15 of resolution 1737 (2006) shall also apply to the entities of the Islamic Republic of Iran Shipping Lines (IRISL) as specified in Annex III and to any person or entity acting on their behalf or at their direction, and to entities owned or controlled by them, including through illicit means, or determined by the Council or the Committee to have assisted them in evading the sanctions of, or in violating the provisions of, resolutions 1737 (2006), 1747 (2007), 1803 (2008) or this resolution.”).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* para. 15 (“[The UN Security Council *n*]otes that States, consistent with international law, in particular the law of the sea, may request inspections of vessels on the high seas with the consent of the flag State, and *calls upon* all States to cooperate in such inspections if there is information that provides reasonable grounds to believe the vessel is carrying items the supply, sale, transfer, or export of which is prohibited . . . for the purpose of ensuring strict implementation of those provisions.”).

UNSCRs.<sup>78</sup> The authority to dispose of prohibited items now explicitly applies to in-port inspections<sup>79</sup> and inspections at sea.<sup>80</sup> Previous UNSCRs failed to address the subject of disposition adequately, leaving States—many of which had liability concerns—uncertain of what they may do with the items they had seized.

- Bunkering: UNSCR 1929 applies “to Iranian-owned or -contracted vessels, including chartered vessels.”<sup>81</sup> If applied comprehensively, this restriction could have a significant impact on Iranian trade, affecting almost every Iranian vessel except for those that can complete their voyages without stopping for fuel.
- Claims: UNSCR 1929 provides protection from lawsuits that arise from actions taken under the authority of this resolution.<sup>82</sup>

None of this is earth-shattering, and much of it could have been accomplished by sovereign states acting independently, prior to the UNSCR’s adoption, but due to their mandatory nature,<sup>83</sup> these provisions

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<sup>78</sup> *Id.* para. 16 (“[The UN Security Council *d*]ecides to authorize all States to, and that all States shall, seize and dispose of (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer, or export of which is prohibited . . . that are identified in inspections pursuant to . . . this resolution . . . and *d*ecides further that all States shall cooperate in such efforts.”).

<sup>79</sup> *Id.* para. 14 (“[The UN Security Council [*c*]alls upon all States to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from Iran, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited . . . for the purpose of ensuring strict implementation of those provisions.”).

<sup>80</sup> *Id.* para. 8 (“[A]ll States shall prevent the direct or indirect supply, sale or transfer to Iran, from or through their territories or by their nationals or individuals subject to their jurisdiction, or using their flag vessels . . .”).

<sup>81</sup> *Id.* para. 18.

<sup>82</sup> *Id.* para. 35.

<sup>83</sup> Some paragraphs use the word “decides.” *Id.* paras. 7–13. See *supra* note 68 and accompanying text for a discussion of the effect of using the word “decides”—making a provision mandatory.

could have a significant impact on maritime practice if applied comprehensively by member states.

*B. UNSCR 1874 Regarding North Korea—A Significant Development*

Here is a final area in which there is perhaps a very promising development. Although we have not acquired additional boarding authority in the service of countering proliferation with respect to Iran, a recent UNSCR with respect to North Korea, adopted in June 2009 (UNSCR 1874), raises some interesting questions about what other actions the UN Security Council may take.<sup>84</sup>

This is the significant language of UNSCR 1874:

12. [The UN Security Council *c*]alls upon all Member States to inspect vessels, with the consent of the flag State, on the high seas, if they have information that provides reasonable grounds to believe that the cargo of such vessels contains items the supply, sale, transfer, or export of which is prohibited . . . , for the purpose of ensuring strict implementation of those provisions;<sup>85</sup>
13. [The UN Security Council *c*]alls upon all States to cooperate with [the above inspections], and, if the flag State does not consent to inspection on the high seas, *decides* that the flag State shall direct the vessel to proceed to an appropriate and convenient port for the required inspection . . . .<sup>86</sup>

Here, one finds more forceful—and potentially more effective—language with respect to activities on the high seas. In UNSCR 1874, the Security Council preserves the flag state consent regime, but goes one step further. Under operative paragraph 13, if the flag state decides not to consent to a boarding, it must direct the vessel to an “appropriate and convenient port” where the required inspection may be conducted.<sup>87</sup> Thus, the flag state has

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<sup>84</sup> For example, S.C. Res. 1874 expands the arms embargo to and from DPRK (imposed by UNSCR 1718) from major weapons to all weapons, except imports to DPRK of small arms and light weapons. S.C. Res. 1874, *supra* note 38, para. 10.

<sup>85</sup> *Id.* para. 12.

<sup>86</sup> *Id.* para. 13.

<sup>87</sup> *Id.*

only two options—either permit the high seas inspection, or divert the vessel to a port where the inspection may take place.

Although UNSCR 1874 comes tantalizingly close to giving “teeth” to our international maritime interdiction laws, it still falls short of what one could call an enforceable, effective maritime inspection regime. The key decision remains with the flag state, and, under the UNSCR, patrolling states do not have the authority to board such vessels at sea, without flag state consent.<sup>88</sup> Whether other options or forms of coercion (e.g., forcible countermeasures to assist the Security Council in remaining “seized of the matter”)<sup>89</sup> may develop to “enforce” a flag state’s decision—to either allow a boarding or divert to an appropriate port for inspection—is something that only time will tell. In addition, it will be interesting to see if the Security Council will decide to present Iranian vessels with a similar choice by enacting an analogous resolution with respect to Iran.

## V. CONCLUSION

Counter-proliferation on the high seas remains quite challenging from a legal perspective. This does not mean that the United States is idly standing by as proliferators use the seas to transport WMD-related materials. In-port customs inspections are our major line of defense against proliferation. Of course, a problem remains since proliferating vessels do not usually visit ports where inspections are rigorously conducted. For example, North Korean ships often utilize ports in China or Burma, where, despite U.S. requests, extensive inspections do not occur.<sup>90</sup>

For this reason, our capability to conduct high seas inspections remains a priority. At this point, the vast majority of at-sea inspections occur consensually. In fact, the United States has concluded eleven ship-boarding agreements with flag states, whereby those states have agreed in advance to cooperate with future requests to board their ships.<sup>91</sup> Those eleven international agreements are with states that move the majority of the world’s shipping tonnage.<sup>92</sup> Also, we often conduct boardings with the consent of a

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<sup>88</sup> *Id.* para. 12.

<sup>89</sup> *Id.* para. 34.

<sup>90</sup> See Rajaram Panda, *A China-North Korea-Myanmar “Axis” in the Making?*, INST. FOR DEF. STUD. & ANALYSES (June 17, 2010), [http://www.idsa.in/idsacomments/ACHinaNorthKoreaMyanmarAxisinthemaking\\_rpanda\\_170610](http://www.idsa.in/idsacomments/ACHinaNorthKoreaMyanmarAxisinthemaking_rpanda_170610) (positing a growing economic, military, and political relationship between the three countries).

<sup>91</sup> *Ship Boarding Agreements*, *supra* note 24.

<sup>92</sup> *Id.*; see also ALLEN, *supra* note 24, at 53 (noting that the new bilateral agreements accounted for a substantial majority of the world’s commercial vessel tonnage).

master, although a master's consent grants less authority to search—and no authority to seize—than does a flag state's consent. Nevertheless, the authority to board a vessel with the granting of a master's consent plays an important role in ocean surveillance and intelligence.

Except in cases of statelessness, nonconsensual boarding at sea is not a practical tool in counter-proliferation at this point. A stronger UNSCR will be required before that can take place, and such a resolution is not currently on the horizon. But the law continues to evolve.

