

LEGAL AUTHORITY OF COASTAL STATES IN THE INTERDICTION OF FOREIGN VESSELS ON THE HIGH SEAS

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ABSTRACT

The terror attacks of 11 September 2001 dramatically changed the course of world events. It is observed that they have led to a re-definition of the threat to US, Europe and indeed the global security as the nexus between terrorism and weapons of mass destruction (WMD), and the possibility of access to such weapons through failed states or 'rouge regimes'. Accordingly, this report examines the legal authorities or otherwise of coastal states to engage in the interdiction of foreign vessels on the high seas. The reporter used a descriptive research design method. The findings indicate that in the wake of 9/11, Washington initiated its Global War on Terrorism (GWOT), first in Afghanistan and then in Iraq. The Proliferation Security Initiative (PSI) proposal to establish a comprehensive enforcement mechanism which aims to restrict WMD trafficking in the air, on land and at sea. The threat to international community through the proliferation of WMD has been recognized by both individual coastal states and the wider international community; but the methods available to deal with the threat have not enjoyed the same degree of international consensus. Any coastal state sanctioning action directed at interdicting foreign ships on the high seas would be running the risk of breaching international law and may leave the authorizing state liable to a claim in compensation. Although the PSI maritime interdiction activities breach international law, a coastal state intent on pursuing such interdiction activities has an array of options available in which to chart a course around the heavy rocks of illegality of such activities.

INTRODUCTION

The terror attacks of 11 September 2001 dramatically change the course of world events. Roberts (2003) observes that they have led to a re-definition of the threat to US, European and indeed the global community security as the nexus between terrorism and weapons of mass destruction (WMD), and the possibility of access to such weapons through failed states of 'rouge regimes'. The greatest damage identified in almost all defence and foreign policy statements coming out of western governments is the "crossroads of radicalism and technology", or the fear that terrorists aided by despots will acquire and use nuclear, chemical or biological weapons. For example, in the wake of 9/11, Washington initiated its Global War on Terrorism (GWOT), first in Afghanistan and then in Iraq. Thus, the world led by US was determined to find a preventive solution to the ugly events of September 11, 2001.

Persbo and Davis (2004) in their postulation explained that the Proliferation Security Initiative (PSI) is a US-led proposal to establish a comprehensive enforcement mechanism which aims to restrict WMD trafficking in the air, on land and at sea; and thereby increase the political and economic costs of such trafficking. The focal point of the PSI is a set of political binding interdiction principles, which call on all States concerned with preventing the proliferation of WMD's to amongst others, effectively interdict WMD delivery systems and related materials to and from entities of proliferation concern. Accordingly, this report briefly examines the legal authorities or otherwise of coastal states to engage in the interdiction of foreign vessels on the high seas.

MEMBERSHIP AND TARGETS OF THE PSI

The PSI is an activity not an organization, consisting of an adhoc coalition of states, including Group of Eight Developed Nations (G8), European Union Countries (EU), Non-Aligned Treaty Organization (NATO) and three non-western countries, that is, Australia, Japan and Singapore (Yang, 2003). The aim of the PSI is to "establish a more coordinated and effective basis through which to impede and stop shipments of WMD delivery systems, and related materials. The targets of this initiative are "states and non-states actors of proliferation concern (McGlinchey 2004).

Interdiction efforts of PSI members appear to be focusing on hub trafficking, that is, those key ports and sea-lanes that are crucial to current trafficking networks. This is because majority of the world's shipping passes through these ports, and concentrating PSI assets in a few geographically small areas will greatly enhance the participant's intelligence gathering capability. Secondly, since the port state has exclusive jurisdiction over its own territory there are likely to be fewer legal complications carrying out searches and seizing goods while a ship is moored to a dock (McGlinchey, 2004). However, the territorial application of the PSI is potentially far-reaching and covers these zones: the internal waters of the participant state; the territorial seas of the participant state; the contiguous zone of the participant state; and international waters. Thus the principles commit participants to seriously consider mutual boarding arrangements.

SOVEREIGNTY AND JURISDICTION OF THE COASTAL STATES

Chaffee (2004) explains that the concept and definition of 'sovereignty' is central in international law, and crucial element of the PSI. States are considered as both creators and subjects of international law, with their own legal personality. Closely connected to 'sovereignty' is the concept of 'jurisdiction'. Basically, jurisdiction can be divided into three categories: A jurisdiction to prescribe laws; a jurisdiction to adjudicate laws; and a jurisdiction to enforce laws. According to United Nation's Convention on the Law of the Sea (UNCLOS), the sovereignty of a coastal state extends beyond its land territory and internal waters to adjacent belt sea, described as the territorial sea. The territorial sea usually extends to a limit of 12 nautical miles, measured from baselines, most commonly being the low-water line along the states coast.

Davies and Dickey (2004) further explained that as far as ports are concerned, the outermost working part of the permanent harbour system is regarded as forming part of the coast. Accordingly, as soon as a vessel passes the outermost permanent harbour works and continues towards the docks, it enters the state's internal waters. The jurisdiction of the coastal state fades the further away a ship is from the state's coast. Sovereignty over internal waters is not explicitly defined in UNCLOS, although it can be inferred that states are entitled to exercise the same absolute sovereignty in internal waters as they are on their land territory. Sovereignty over the territorial sea is not however, absolute as the 'sovereignty' over the territorial exercised subject to UNCLOS and other rules of international laws (Davies and Dickey 2004). One limitation on coastal state's sovereignty in the territorial sea is the right of innocent passage, whereby ships of all states enjoy the right of innocent passage through the territorial sea (UNCLOS article 110).

UNCLOS, part 11, s.3, article 27, also outlined some circumstances under which the coastal state, irrespective of its interpretation of the rule as such, has criminal jurisdiction over a foreign vessel in its territorial waters, irrespective of where the vessel is heading or has been, namely: (a) if the consequences of the crime extend to the coastal; (b) if the crime is of kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or counsellor officer of the flag state, or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

Roberts (2003) argues that paragraph (c) above, closely corresponds with PSI principles 4 (c) which provides that the participating state should, 'seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states, and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states'. Thus, if one PSI participant suspects a ship transiting its territorial waters and flying the flag of another PSI participant of carrying WMD related cargoes, it can ask for a diplomatic agent of the other state to 'request their assistance'. It is when the suspected ship belongs to a nation that refuses to provide consent for a boarding action that paragraphs (a) (b) and (d) above come into play.

In terms of WMD, most PSI participating countries already have criminal laws governing the transfer of such weapons. In the UK, for example, participation in the transfer of nuclear weapons already constitutes an offense according to the 2000 Anti-terrorism Crime and Security Act, and in Australia, according to the Australian WMD (Prevention of Proliferation) Act of 1995, section II, any services rendered that may assist a WMD-programme, may under certain circumstances, be an offense (Roberts 2003). Interdiction of vessels carrying WMD in international waters. UNCLOS Part VII, article 86, refers to international waters or high seas as embody of all waters that are not part of a nation's territorial waters, contiguous zone or Exclusive Economic Zone (EEZ). PSI participants will find that the law of the sea

severely restricts the coastal state's options to enforce its law in these waters. Ordinarily, on the high seas, a ship is under the 'exclusive jurisdiction of the state whose flag it flies. The PSI participants have repeatedly stated the interdiction activities will be undertaken consistent with national legal authorities and relevant international law and frameworks (Springall and Glover, 2007). As it is arguable that UNCLOS does not provide any justifiable legal foundation for naval or any other forces to interdict vessels in support of PSI activities; the question then becomes, what legal frameworks will facilitate a high seas interdiction within the eyes of the international community?

Consequently, the recent United Nations (UN) report on the Mavi Marmara incident, entitled "Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla (Vessel) incident" largely exonerates Israel; and this seem to boost the campaign against GWOT led by the US and its allies. Abram's (2011) observes that "Israel faces a real threat to its security from militant groups in Gaza. The naval blockade was imposed as a legitimate security measure" and Israeli Defence Forces personnel faced significant, organized and violent resistance from a group of passengers when they boarded the Mavi Marmara requiring them to use force for protection". The UN panel's report challenges the motives of the Flotilla and also questions the true nature and objectives of the Flotilla organizers; and more seriously, the panel concludes that the so-called 'humanitarians' on board the Flotilla (Mavi Marmara) were found to be fully armed for a fight.

NAVIGATING OUT OF THE LEGAL OBSTACLES

Springall and Glover (2007) submit that US has insisted it has the necessary authority to board vessels under a general right of self-defence when acting on a serious belief that the vessels carry WMD material, for example, the Mavi Marmara (Flotilla) episode mentioned above supports the US assertion. This authority must however, be read in light of Article 2 (4) of the UN charter, which contains a general prohibition on the use of military force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nation.

The United Nations Security Council on 28th April 2004 passed Council Resolution 1540, which affirms that proliferation of nuclear, chemical and biological weapons (NBC) contributes a threat to international peace and security. The preamble goes on to state that the UN is 'gravely concerned by the threat of illicit trafficking in nuclear, chemical or biological weapons' and requires all States to 'adopt and enforce appropriate effective laws which prohibited any non-state actor to transport nuclear, chemical or biological weapons. Paragraph 10 of Resolution 1540 requires all States in accordance with their national legal authorities and legislation and consistence with international law, to take cooperative action to prevent illicit trafficking in NBC materials (UNSCR 2004). Although falling short of authorizing coastal states authorities to interdict WMD on the high seas, certainly, Resolution 1540 does acknowledge the need for better legal and regulatory frameworks to prevent illicit trafficking to non-state actors, and in that sense supports the underlying rationale for the PSI.

Chaffee (2004) submits that another way of navigating the legal obstacles is through customary development of international law. PSI participants may identify wide state participation as a basis for creating a new international norm authorizing interdiction on the high seas. Participant States may also consider amending UNCLOS to accommodate the threat by WMD proliferation. Yang (2003) also opines that the most direct way of achieving the PSI's stated objective is through the employment of bilateral boarding agreements. The British used this type of agreements in the 19th century to curb the international slave trade by providing 'reciprocal rights of visit and search over vessels in parts of the high seas'. PSI members may also request visit and search rights and also streamline the procedures necessary for flag state authorization of such actions. Chaffee (2004) also observes that US has secured a number of bilateral boarding agreements with countries such as Liberia, Panama, Marshall Islands, Croatia, Belize and Cyprus. Thus, Nigeria need a bilateral boarding agreement with other maritime nations in order to guarantee the legal rights of Nigerian naval forces to interdict a foreign vessel suspected of carrying WMD on the high seas.

REVIEW OF RELEVANT NATIONAL AND INTERNATIONAL LAW

Bergin (2003) argues that "there is nothing in the law of the sea convention that would allow a country to intercept a vessel in international waters on suspicion that it is carrying arms or WMD" (This relatively attempt to answer the Mavi Marmara (Flotilla) incident). Although Nigeria is not a participating member of PSI, but as a maritime trading nation which depend heavily on protecting the convention provides for its shipping, may not likely violate it. Springall and Glover (2007) state that the interdiction principles provides that the participants are obliged to work to strengthen their relevant national legal authorities and to work to strengthen international law and frameworks in appropriate ways to support the development of the initiative.

Member states are required to enact legislations which strengthens not only the participant's ability to intercept ships in its national waters but also to enhance its capability to seize interdicted cargoes and punish those involved in the trafficking (Springall and Glover, 2007). Already several states have enacted criminal legislation prohibiting unauthorized transports of nuclear, biological and chemical (NBC) materials on their territory. In Australia, for instance, the relevant piece of legislation is the Nuclear Non-Proliferation (safeguards) Act in 1987. Although this legislation was enacted to give effect to certain obligations that Australia has under the Nuclear Non-Proliferation Treaty (NPT). However, Yang (2003) explains that the act is applicable to all nuclear materials and associated terms and defines which activities relating to the handling of nuclear materials constitutes a crime under Australian law. For instance, the possession of nuclear materials or associated items carries a maximum sentence of imprisonment for a period not exceeding five years (Anthony, 2004).

PSI Potential Impact on Global Trade: Matsuya (2005) high lights that while UNCLOS furnishes ships with the right of innocent passage and freedom of the seas; today, world seaborne trade continues to expand with over 90 percent of the world trade carried by sea. Whilst there are difficulties in placing a monetary figure on the value or volume of world seaborne trade, the United Nations Conference on Trade and Development estimates the operation of merchant ships contributes about USD450 billion in freight rates within the global economy, equivalent to about 7 percent of total world trade. (As of 1st January 2005, the world trading fleet was made up of 46,222 ships with a combined gross tonnage of 597,709,000 tonnes).

Also contributing to the PSI actions, consequences, and potential impact on global trade, Springall and Glover (2007) argue that representative of the international nature of the shipping industry and the volume and value of trade carried by sea, emphasis is duly placed on a global maritime regulatory framework. And that should Nigeria, or another PSI participant, initiate boarding vessels on the high seas outside of the guidelines advanced, such interdictions would carry the material risk of harassing legitimate shipping, disrupting the veins of international commerce, and threatening the very fabric which makes up UNCLOS, the constitution for the Oceans.

CONCLUSION

The threat to international community through the proliferation of WMD has been recognized by both individual coastal states and the wider international community alike. Whilst agreement can arguably be reached on this point, the methods available to deal with the threat have not enjoyed the same degree of international consensus. Any coastal state sanctioning action directed at interdicting foreign ships on the high seas in compliance with the PSI statement of interdiction principles would be running the risk of breaching international law and may leave the authorizing state liable to a claim in compensation. Although the PSI maritime interdiction activities breach international law, a coastal state intent on pursuing such interdiction activities has an array of options available in which to chart a course around the heavy rocks of illegality of such activities. More so that the recent Israeli/Gaza episode, popularly referred to as the Mavi Marmara (Flotilla) UN report, may now spur many PSI participating States into taking the risk of experimenting the PSI statement of principles of interdicting foreign vessels on the high seas.

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