

# XV

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## Panel III

### Commentary—Maritime & Coalition Operations

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Kenneth O'Rourke<sup>1</sup>

I well remember the day, during Operation ENDURING FREEDOM, that General Tommy Franks<sup>2</sup> called me into his office and stated that intelligence indicated there were four vessels containing al Qaeda members departing Pakistani waters on their way to Northern Africa. His question was, what are we authorized to do? My response was that we are within our rights to intercept them—with some quick coordination, maritime interception operations (MIO) were born. I based my response primarily on Article 51 of the UN Charter and articulated that we had the right to intercept vessels containing terrorist leaders who represented an immediate threat to our country. Since this initial intercept, I have heard many argue that maritime intercepts are nothing more than piracy and interference with freedom of the high seas. Piracy it is not. The coalition is not interdicting every vessel on the high seas, nor stopping every vessel at gunpoint. Interdiction measures are limited in nature and

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1. Commander Kenneth O'Rourke is a US Navy judge advocate serving as the Deputy Staff Judge Advocate for US Central Command.

2. General Franks is the current commander of the US Central Command. The Central Command geographic area of responsibility includes Afghanistan.

designed to address a specific threat, including what is ultimately a threat even to maritime safety.

There are a number of legal authorities used by various nations to conduct these operations. Two of the legal justifications for conducting MIO used by many of the coalition partners are the consent of the master and/or the consent of the flag state to conduct a visit/search. In that regard, the United States has bilateral agreements with various countries permitting such boardings. The belligerent right of visit and search is yet another authority some nations rely on. Of course, however, Article 51 of the UN Charter has come to be accepted as the primary basis for undertaking such operations.

In this war on terror there is a nontraditional enemy. This war does not have many of the characteristic associated with a traditional war. There is an enemy that blends with civilians, a criminal enemy in the case of al Qaeda, operating with an unrecognized sovereign, the Taliban. Neither of these enemies operate within a recognized chain of command that conforms to the laws of armed conflict, nor do they have traditional target sets such as military infrastructure and armored vehicle formations to engage. This is a new kind of war. This “war” is unique in that it is a blend of fighting criminals and traditional combatants. A war fought applying international criminal law and the law of armed conflict. Nontraditional measures may be required to respond to this threat.

For the time being, Article 51 provides the coalition with the necessary authority to engage in maritime interception operations against both the criminal and combatant elements of our enemy. This right to conduct operations in “self-defense” may become attenuated over time, however, as Afghanistan becomes a legitimate state and al Qaeda goes into, no doubt temporary, hiding. As time passes, the question will loom larger and larger as to whether the immediacy of the threat exists and additional authority is needed. Perhaps the authority to continue maritime interception operations against terrorist elements already exists as a matter of custom under international law. Will the Article 51 justification fade and not provide adequate authority to continue maritime intercept operations against terrorists? Only time will tell.

As we all know, Article 110 of the UN Law of Sea Convention (LOS Convention) provides authority to exercise limited jurisdiction over foreign flag vessels. That is, to undertake the right of approach and visit in circumstances where it is suspected that a vessel is, among other things, engaged in piracy or

slave trade, or when the vessel is flagless.<sup>3</sup> Does the international community need more authority than is provided by Article 51 of the Charter, similar to that contained in Article 110 of the LOS Convention, to counter the threat from terrorism? I suggest that the additional authority already exists in custom and needs to be explicitly recognized. Application of Article 51 has its natural limits - temporal limits and geographic limits that are viewed by many to preclude continuing maritime interception operations to thwart present and future terrorist threats. It may be time for the international community to recognize that "terrorism" is an internationally recognized crime that is equally as abhorrent as piracy and slavery and that additional authority is required to combat the threat.

Only the future holds the answer to a number of very important questions related to the war on terrorism in a maritime environment. It remains to be seen if the United States and coalition partners can continue to use Article 51 as the basis for maritime interception operations six months or a year from now. Will it work over the entire globe or only close to Afghanistan? Will we be able to approach vessels providing financial support to terrorist networks planning a strike six months from now? Will these actions be acceptable under an Article 51 self-defense concept or will new legal authority be required by the international community? Have new legal authorities already been established in custom and practice treating vessels playing a part in terrorism like vessels participating in slavery and piracy? Clearly, there are unknowns in the future of the war on terrorism. The international community must address these issues and provide the legal authorities necessary to continue to prosecute the war on terrorism in a maritime environment.

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3. See U.N. Convention on Law of the Sea, U.N. Doc. A/CONF.62/122 (1982), reprinted in BARRY CARTER AND PHILLIP TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS (2001), at 553.