# INTERDICTING VESSELS TO ENFORCE THE COMMON INTEREST: MARITIME COUNTERMEASURES AND THE USE OF FORCE

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**Abstract** Can the law of countermeasures be used to police the high seas? The freedom of the high seas is guaranteed by the immunity of a State's flag vessels from interference by the public vessels of other States, subject to limited exceptions. However, this rule of non-interference may shield those engaged in unregulated or illegal fishing or transporting weapons of mass destruction and their precursors. This article argues that while such conduct may breach obligations protecting the common interest, unilaterally boarding and arresting a vessel involved would constitute an illegal use of force and cannot be justified as a countermeasure.

## I. UNILATERAL ENFORCEMENT ACTION AGAINST FOREIGN VESSELS

Can a State's navy or coastguard unilaterally enforce a UN Security Council Resolution requiring States to prevent weapons of mass destruction reaching non-State actors? Is one State justified in arresting the delinquent fishing vessels of a fellow-member of a Regional Fisheries Organization on the basis that such actions serve the collective interest? Arguments are emerging about the role of countermeasures in enforcing collective interest obligations on the high seas. The purpose of this note is to briefly review some of these arguments, and in particular to respond to the suggestion that taking such countermeasures would not violate the prohibition on the use of force in international relations.

Under limited circumstances States may unilaterally take action to secure their rights under international law. The principal form of such self-help is taking countermeasures:[1] the suspension of the performance of an international obligation by an injured State in order to induce a wrongdoing State to resume compliance with their legal obligations.[2] That is, State A is considered

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[1] DJ Bederman, 'Counterintuiting Countermeasures' (2002) 96 AJIL 817, 818; E Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889, 890 and see the International Law Commission commentary reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (CUP, Cambridge, 2002) 281 at (1) [hereinafter, 'ILC Commentary in Crawford'].

[2] Art 49, International Law Commission, The Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (28 Jan 2002) [hereinafter 'Articles on State Responsibility']; and see the ILC commentary reproduced in Crawford (n 1) 284–7.

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'injured' and is entitled to take peaceful countermeasures against State B if State B breaches an obligation owed to it.[3] A is also 'injured' if it is 'specifically affected' by B's breach of an obligation owed to a group of which A is a part, or if B's breach radically affects the position of all members of the group with respect to the obligation's continued performance.[4] This concept of 'specifically affected' State thus contemplates that a State may, in some circumstances, take unilateral action in the collective interest. How far may this conception stretch, especially in managing the uses of the seas, the classic global commons and collective resource?

A number of authors have now suggested that the law of countermeasures may permit unilateral boarding and arrest of foreign vessels at sea ('interdiction') in order to secure compliance with obligations furthering the collective interest.[5] The argument has been put that if weapons of mass destruction, their delivery systems or related precursors (collectively, 'WMD') are being transported by sea to a non-State actor, then the transporting vessel's flag State is in breach of UN Security Council Resolution 1540 and States could, as a countermeasure, interdict the vessel regardless of whether the flag State consents.[6] It has also been suggested that a Member State could be justified, in some circumstances, in enforcing compliance with Regional Fisheries Organization (RFO) management and conservation measures against other members through non-consensual at-sea boarding and arrest of their vessels as a countermeasure.[7] Indeed, the same argument may stretch to allowing RFO members to take such action against even non-Party vessels where their flag State is failing in its duty merely to cooperate with the RFO.[8] In either case the argument runs that the duty to respect the exclusive jurisdiction of a flag State over its own vessels on the high seas could be suspended as a countermeasure, thus making it permissible to board and arrest the vessel or persons on board and seize cargo or fishing gear.[9] These arguments encounter two critical and

[3] Art 42, Articles on State Responsibility (n 2); and the ILC Commentary in Crawford (n 1) 260.

[4] ibid; cf EB Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 AJIL 798, 802 ff.

[5] See R Rayfuse, *Non-Flag State Enforcement* (Martinus Nijhoff, Leiden, 2004) 347 and 372–3; W Heintschel von Heinegg, 'The Proliferation Security Initiative: Security vs Freedom of Navigation?' (2005) 35 Israel Yearbook on Human Rights 181.

[6] Heintschel von Heinegg (n 5) 200–1; cf S Kaye, 'The Proliferation Security Initiative in the Maritime Domain' (2005) 35 Israel Yearbook on Human Rights 205, 223–4.

[7] R Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 Netherlands International Law Review 41, 63–5; Rayfuse (n 5) 347 and 372.

[8] Rayfuse (n 7) 55 and 59; Rayfuse (n 5) 373. Duties to cooperate are found in Art 117, United Nations Convention on the Law of the Sea, 1982, (1994) 1833 UNTS 3 [hereinafter 'UNCLOS'] and Art 8, The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, 2167 UNTS 88. See the discussion accompanying (n 23)–(n 25), below.

[9] *Lotus* case, PCIJ Series A, No 10, 1927, 4 at 25; Art 6(1), High Seas Convention, 1958, (1963) 450 UNTS 82; Art 92(1), UNCLOS.

common difficulties. The first is whether, and in what circumstances, a State may take unilateral action regarding a wrongdoing State's breach of an obligation owed to a group of States or the international community as a whole ('countermeasures in the collective interest'). In particular, can a State invoke countermeasures in the collective interest when it has not itself suffered any direct injury? The second, and more significant problem, is the prohibition on the use of force in international relations generally, and in the conduct of countermeasures in particular.[10]

While these questions will be dealt with in order, it is worth first briefly outlining the principal arguments that the prohibition on the use of force is not breached by stopping and searching foreign ships at sea. One line of argument has been that although maritime interdiction will often be conducted by naval personnel, the correct characterization of interdiction as a countermeasure is as a 'police action'. As the UN Law of the Sea Convention ('UNCLOS') expressly contemplates such police enforcement action in certain limited cases, and as UNCLOS provisions cannot be presumed to be contrary to the UN Charter prohibition on the use of force, it must then follow that police actions are not prohibited as uses of force.[11] Another possible approach has been to contend that as flag States have only 'exclusive', and not 'territorial', jurisdiction over their vessels at sea, boarding and seizing a vessel by force does not violate the prohibition on the use of force against the territorial integrity of political independence of the flag State.[12] Both of these arguments boil down to the proposition that it is 'the mission, not the uniform' that determines whether the prohibition on force has been breached.[13] This note will argue that taking either approach misconstrues the relationship of the law of the sea with the general principles on the use of force in international relations. First, however, it is necessary to review the controversy as to whether an individual State is entitled to take countermeasures in the collective interest.

## II. COUNTERMEASURES IN THE COLLECTIVE INTEREST

The purpose of this section is to demonstrate the centrality of the idea of an 'injured State' to the law of countermeasures and the difficulty of bringing unilateral action in the collective interest within this framework. As noted above, countermeasures are ordinarily available to an injured State when

[10] Art 2(4), Charter of the United Nations, UNCIO XV, 335; amendments by General Assembly Resolution in UNTS 557, 143/638, 308/892, 119; Art 50(1)(a), Articles on State Responsibility (n 2).

[11] Rayfuse (n 7) 74.

[12] Kaye (n 6) 218.

[13] CH Allen, 'Limits on the Use of Force in Maritime Operations in Support of WMD Counter-Proliferation Initiatives' (2005) 35 Israel Yearbook on Human Rights 115, 125.

another State has breached an obligation owed to it. A State will also be an 'injured State' where the obligation breached was owed to a group and the State taking countermeasures was specifically affected, or the breach has radically changed the position of all members of the group. The requirement of an injured or specifically affected State is crucial; it is the criterion that identifies who is permitted to take action that would otherwise be unlawful in response to a State's prior illegal conduct.

Might there, however, be a special rule of general international law allowing a State to take countermeasures to preserve or protect a collective interest, regardless of whether it has suffered a specific injury? The ILC Articles on State Responsibility only expressly contemplate a non-injured State demanding cessation of the breach of obligation and reparation to those affected by it.[14] The Articles are, however, without prejudice to the question of what measures a State, other than an injured State, might take in respect of an obligation 'owed to a group of States including that State, . . . established for the protection of a collective interest of the group.'[15] Thus, the Articles do not (and do not purport to) address the issue of 'collective interest' countermeasures.[16] The ILC commentary, after reviewing the 'embryonic' and 'controversial' relevant State practice,[17] concludes that:

> the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States . . . [other than an injured State] to take countermeasures in the collective interest.[18]

It is certainly possible to view the ILC's assessment of State practice as 'over-cautious' and to conclude that 'at least in the case of *systematic or large-scale* breaches of international law, there seems to exist a settled practice of countermeasures by States not individually injured.'[19] However, the relevant practice is almost exclusively limited to trade or economic measures taken in response to widespread human rights abuses or outright territorial invasions.[20] Advocates of interdiction as a countermeasure for breaches of collective interest obligations thus face two problems. First, it is not clear that over-fishing or transfer of WMD precursors rank with the 'systematic or large-scale' breaches of fundamental obligations that have triggered collective interest countermeasures in several instances in the past.[21] Secondly, it is not clear that the coun-

[14] Art 48, Articles on State Responsibility (n 2).
[15] Arts 54 and 48, Articles on State Responsibility (n 2).
[16] ILC commentary reproduced in Crawford (n 1) 283 at (8); R Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' (2004) 51 Netherlands International Law Review 41, 49.
[17] ILC commentary reproduced in Crawford (n 1) 283 at (8).
[18] ibid 305 at (6).
[19] C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP, Cambridge, 2005) 231 (emphasis added).
[20] ILC commentary reproduced in Crawford (n 1) 302–5; Tams (n 19) 209–28.
[21] ibid. The ILC commentary cites eight such episodes, Tams cites 13.

termeasures taken in such cases have ever extended beyond economic measures to more forceful action. It is also difficult to find any evidence of interdiction actually being used as an environmental countermeasure in the collective interest, except perhaps the *Estai* incident noted below.

At best, proponents of interdiction as a countermeasure may conclude that the general practice 'clearly evidenced an assertion of the right by [some] states to resort to such [collective interest] countermeasures and it is unlikely that state practice will reverse its course' absent effective institutional enforcement.[22] This argument, however, on its own terms and present State practice appears confined to being one about what the law might become, not what it presently is. If there is currently a rule or practice permitting collective interest countermeasures, it would appear confined to cases of widespread and systematic human rights abuses or acts of aggression.

Those proposing that countermeasures may currently be taken at sea in the collective environmental or security interest are thus still required to demonstrate that any State taking unilateral action would be entitled to do so as an *injured* State. This obviously poses specific difficulties and raises the question of whether the 'injury' done to collective interests is so diffuse as to prevent any State being specifically affected. Further, the highly diffuse nature of the interests protected may put it beyond the power of any one State to change the position of all members of the relevant group sufficiently to allow any member of the group to invoke countermeasures.

Let us consider first the case of high-seas fishery conservation and management measures. The general obligation upon States to cooperate or take measures 'for the conservation of the living resources of the high seas' under Article 117 of UNCLOS is a clear example of an obligation so diffuse that it is difficult to see how one individual State is directly affected by another State's individual (or even repeated) breach of it. Indeed, there is significant scope for disagreement as to what might constitute a 'breach' of this obligation to cooperate in the first place. It is also hard to conceive how one State could radically change the position of all others regarding continued high-seas conservation efforts, absent a single State by its efforts alone fishing a particular stock almost to extinction.

In the context of enforcement *inter partes* of the conservation and management measures adopted by RFOs, breaches might be easier to judge, but again specific injury in respect of a communal resource to an individual State may be difficult to demonstrate. The attempt has been made, however. It has been argued that:

> each member state [of an RFO] incurs expenses related to the running of the organisation and accepts the restriction of its own national high seas fisheries activities . . . Where restrictions are not complied with by a state which is under a duty to cooperate … then each member which has complied will be specifically

[22] Rayfuse (n 7) 49.

> affected . . . [and] one, or all, . . . [RFO members] would be entitled to resort to countermeasures.[23]

This argument could even be said to apply to RFO non-members on the basis that the Article 117 duty of cooperation in conservation efforts has been 'further delineated' by Article 8 of the Fish Stocks Agreement ('FSA') to expressly require that State parties cooperate with, through, or by becoming members of, RFOs.[24] Even if one accepts the difficult argument that Article 8 of the FSA represents customary law, there is a clear problem with conflating a general duty on the part of non-members to cooperate with RFOs with the specific obligations upon RFO members to implement agreed conservation measures. A duty to cooperate with an organization is not the same as a duty to comply with its rules.

The more significant problem in this approach is that it confuses loss of an opportunity and actionable injury. The fact that RFO members have made sacrifices for the general interest and have an interest in the effective operation of an RFO does not mean they are injured as RFO members or FSA parties by a non-member's contrary conduct. RFO Member States do not have proprietary rights to the fish in the RFO's high seas management area and cannot acquire ownership through their altruistic self-restraint. The only right RFO members have upon the high seas is the same right that all other States enjoy: the right to engage in fishing. Non-party fishing in an RFO-managed area, or even fishing in contravention of RFO management measures, is not stealing from those RFO members who abide by the rules. Such unregulated fishing does not affect their right to fish, only the potential profitability of those fishing efforts. This compels the conclusion that RFO members are not 'injured' or 'specifically affected' in the sense required to invoke countermeasures by non-compliant or non-party fishing in RFO management areas. This argument might be subject to one exception. Where a 'straddling stock', or single biomass, of fish is fished partially on the high seas and partially within a coastal State's Exclusive Economic Zone, it may be that a coastal State could be considered specifically injured if, by analogy with high-seas pollution, unregulated or delinquent fishing of the high seas portion of the stock was such that conservation of the stock required the coastal State to close its EEZ fishery entirely.[25] This appears to be the only case where international law might acknowledge that a lost opportunity to fish amounts to a State being specifically affected, and then seemingly because of the close connection with a State's *exclusive* rights.

The conclusion to be drawn is not that the law of countermeasures has failed collective interests. Countermeasures exist principally to safeguard indi-

[23] ibid 64.
[24] ibid 55 and 59; FSA cited at (n 8).
[25] ILC Commentary to Art 42(b)(i) and Art 48(1)(b) of the Articles on State Responsibility (n 2), reproduced in Crawford (n 1) 259 at (12) and 278 (10).

vidual interests; collective interests require collective, and preferably institutional, methods of enforcement if such action is to be considered legitimate in the present framework of international law.[26] While countermeasures were not invoked at the time, one need only think of the protest that accompanied Canada's unilateral seizure of the Spanish-flagged fishing vessel *Estai* for alleged breaches of RFO management measures in a high-seas fishery to see that the international order seems reluctant to contemplate individual States acting as community policemen.[27]

At a more basic level it is not as if, in the absence of collective interest countermeasures, the international community is left without tools to protect collective environmental interests. Other forms of international cooperation have proved more effective at delivering results, and delivering them with uncontroversial legality, than unilateral action. Port States have implemented controls precluding the unloading and transshipment of fishing catches by vessels or flag States known to be fishing in a manner that undermines RFO conservation and management measures, and such actions have proved effective in several contexts.[28] While 'blacklisted' vessels can of course sail on to other ports, the ports an RFO 'can effectively close' are usually those 'nearest the relevant fishing ground'.[29] These measures can 'widen the circumference of controls, effectively forcing . . . [non-compliant] vessels to sail further to unload' thus decreasing their 'efficiency and profits'.[30] Port State measures are therefore well placed to deter non-compliant fishing by striking at the profitability of the practice. Further, interdiction may not be an effective compliance mechanism in every high-seas fishery. Some RFOs have noted the difficulty of patrolling vast high seas management areas.[31] Even where suspect vessels are discovered through aerial surveillance their remote location may make surface investigation (let alone interdiction) impossible.[32]

A similar case for interdiction as a countermeasure has been advanced regarding collective security interests. UNSCR 1540 affirms that 'proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security' and requires,

[26] Cannizzaro (n 1) 913–14.

[27] *Fisheries Jurisdiction Case (Spain v Canada)* [1993] ICJ Reports 432, 433–44, para 20.

[28] See, eg, R Baird, 'CCAMLR Initiatives to Counter Flag State Non-Enforcement in Southern Ocean Fisheries' (2006) VUW Law Review 733, 745–6; the North East Atlantic Fisheries Commission port State scheme has also been described as a 'success story': NEAF Commission, *Report of the Permanent Committee on Control and Enforcement* (11–12 Oct 2005), 8 and 36 (available at <http://www.neafc.org/reports/peccoe/docs/peccoe_oct-2005.pdf>).

[29] Baird (n 28) 740.

[30] ibid.

[31] See, eg, the Commission for the Conservation of Antarctic Marine Living Resources' website <http://www.ccamlr.org/pu/e/gen-intro.htm>.

[32] Regarding surveillance of the North Pacific Anadromous Fish Commission area, see *2005 Report of the Secretary of State of Commerce to the Congress of the United States concerning US actions taken on foreign large-scale high seas driftnet fishing* (National Oceanic & Atmospheric Administration, Washington DC, 2005) 4 (copy on file with author).

inter alia, all States to 'adopt and enforce appropriate effective laws which prohibit any non-State actor to . . . transport, transfer or use nuclear, chemical or biological weapons and their means of delivery'.[33] It has been said that this means that any flag State 'that knowingly allows the transport of WMD … or that does not intervene by preventing such transports on board vessels flying its flag … commits an internationally wrongful act.'[34] This seems a fair interpretation of the duty to adopt and enforce the national laws imposed by UNSCR 1540. A similar argument could now also be made regarding transfers of WMD material to or from North Korea, following UNSCR 1718.[34a] How, though, can any State other than one which is ultimately intended to be the target of a WMD attack as a result of such transport be considered 'injured' by this wrongful act? The attempt to supply the missing link comes in the assertion that:

> [s]ince all forms of WMD proliferation activities by non-State actors are to be considered a threat to international peace and security . . . the category of 'injured State' is not limited to potential target States. Consequently, countermeasures . . . involving visit, search and capture may be taken against vessels and aircraft for the mere reason they are flying the delinquent State's flag . . .[35]

Certainly, any act leading to WMD proliferation has an adverse, though highly diffuse, impact on collective security. However, to invoke countermeasures a duty must be breached that is owed to an individual State or group of States. It is not self-evident that a Security Council Resolution creates obligations 'owed' to the members of the United Nations individually and collectively, as opposed to obligations owed to the Security Council itself. Further, although UNSCR 1540 has been described as creating treaty-like obligations by fiat,[36] it does not on its face establish a network of bilateral or reciprocal obligations between all States (such as the bilateral relations created under UNCLOS in respect of, for example, rights of innocent passage owed each flag State by each coastal State). Transporting WMD in breach of UNSCR 1540 will simply be a breach of the obligations in Articles 25 or 48 of the UN Charter to implement Security Council decisions. The only obvious obligation-holder is the Security Council.

Further, the proposition that any State may unilaterally take countermeasures in respect of any act which the Security Council has declared a threat to international peace and security is breathtaking in its implications. It is particularly surprising in the context of UNSCR 1540, where all references to 'interdiction' were removed from the draft Resolution at the behest of China.[37] The invocation of Chapter VII in the wording of UNSCR 1540 was regarded with

[33] Preamble and para 2, SC Res 1540 (2004).
[34] Heintschel von Heinegg (n 5) 200.
[34a] See paras 8(a), 8 (b) and 8(f), SC Res 1718 (2006).
[35] ibid 200–1.
[36] UNSC Verbatim Record (22 Apr 2004), UN Doc S/PV.4950 (Resumption 1), 14 (Nepal).
[37] S/PV.4950, 6.

deep distrust by several States, who felt that after the 2003 invasion of Iraq it raised the spectre of some States later arguing that the Resolution tacitly authorized the unilateral use of force to enforce compliance with it.[38] The consequences for world order of States enjoying the right to enforce every Chapter VII Security Council Resolution against all other States by means of countermeasures are scarcely appealing. It raises the prospect either of anarchy, if such rights are genuinely available to all, or of 'legalized hegemony', if the right may only be exercised by one or a few superpowers.[39]

Even presuming that UNSCR 1540 creates obligations owed to the UN membership as a whole, it would remain difficult to find States 'injured' by their breach. It is not apparent that the underlying potential threat to international peace and security in any single act of transporting WMD to non-State actors 'injures' a given State unless it is to be the direct target of a planned attack (discussed below). It is even less apparent that the fact that a State's wrongful (in)action may constitute a threat to international peace and security means that every other State in the world is relevantly 'injured' by that wrongful conduct. It is also hard to see that any one given transfer of WMD radically alters the position of all parties to the UN Charter. None of the categories of States entitled to take countermeasures appears to be met: no single State is owed the obligation breached, no single State can be considered a specifically affected member of a group to whom the obligation is owed, nor is the position of all members of that group radically altered by the breach. It is thus hard to see how any one State can claim to be injured by any individual WMD transfer which is not intended for use against its territory. States potentially the target of an attack rendered possible by such a transfer might *arguably* be 'specifically' affected by a given instance of WMD transportation. However, even this proposition is difficult to sustain. If there is an imminent threat of the hostile use of WMD, then anticipatory self-defence under the *Caroline* doctrine may be implicated,[40] but hardly countermeasures.

Again, the conclusion to be drawn is not that counter-proliferation efforts will be seriously hampered by the absence of collective interest countermeasures. Famously, the coalition of States involved in the Proliferation Security Initiative interdicted nuclear centrifuge components aboard the *BBC China* en route to Libya in 2003 without resorting to high-seas interdiction. Though the

[38] ibid 3 (Philippines), 4 (Brazil), 5 (Algeria), 8 (France); S/PV.4950 (Resumption 1), 15 (Nigeria).

[39] G Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, Cambridge, 2004) 67; T Farer, 'Beyond the *Charter* Frame: Unilateralism or Condominium?' (2002) 96 AJIL 359, 363–4; P Weil, 'Towards Relative Normativity in International Law' (1983) 77 AJIL 413, 432–3; K Marek, 'Criminalizing State Responsibility' (1978–9) 14 RBDI 460, 481 ff; contra Tams (n 19) 230 and 240.

[40] If, indeed, the doctrine survives the UN Charter, see: B Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP, Oxford, 2002) vol 1, 803; T Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (CUP, Cambridge, 2002) 97–108; I Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963) 258–61; DW Bowett, *Self-Defence in International Law* (MUP, Manchester, 1958) 189–93.

*BBC China* was flagged in Antigua and Barbuda, it was German-owned, and the German Government (acting on US and UK intelligence) was able to request the owner to bring it into an Italian port where the components were removed by Italian customs officials.[41] This contrasts sharply with the *So San* episode, where a vessel engaged in transporting Scud missiles between North Korea and Yemen was interdicted by Spain (acting on US intelligence) and had to be released due to a lack of any legal basis for confiscating the weapons upon the high seas.[42] Again, cooperative measures implemented through port State control proved more effective than unilateral high seas measures.

The further argument that UNSCR 1540 may nevertheless authorize interdiction of shipping in a State's territorial sea is beyond the scope of the present note,[43] which focuses on high-seas measures. The question of whether there is any direct authorization under UNSCR 1718 to interdict North Korean shiping on the high seas is also beyond the scope of this note.

## III. COUNTERMEASURES AND THE USE OF FORCE

Even where there is a relevantly injured State which is legally entitled to invoke countermeasures against a wrong-doer, there are several constraints upon its freedom of action. Any countermeasures taken must not affect obligations: 'to refrain from the threat or use of force'; 'for the protection of fundamental human rights'; 'prohibiting reprisals'; or those arising 'under peremptory norms of general international law'.[44] Only the prohibition upon the threat or actual use of force will be addressed here.

While it is uncontested that countermeasures may not involve the use of force, there is in the field of maritime interdiction a debate about what should be held to constitute 'force'. Some of the arguments taken up here have been raised only in the context of the wider debate about the lawful use of force at sea in general, not of maritime countermeasures in particular. However, in so far as the prohibition upon forceful countermeasures exists to reflect the UN Charter prohibition on the use of force in international relations,[45] arguments about what might constitute interdiction measures short of armed force under the UN Charter would also appear relevant to a discussion of the limits of non-forcible countermeasures.

[41] D Guilfoyle, 'The Proliferation Security Initiative: Interdicting Vessels in International Waters to Prevent the Spread of Weapons of Mass Destruction?' (2005) 29 MULR 733, 739; see also J Roach, 'Proliferation Security Initiative (PSI): Countering Proliferation by Sea' in M Nordquist, J Moore, and K Fu (eds), *Recent Developments in the Law of the Sea and China* (Center for Oceans Law and Policy, 10) (Martinus Nijhoff, Leiden, 2006) 351–424.

[42] ibid 735–6; M Byers, 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 AJIL 526, 526.

[43] See D Guilfoyle, 'Maritime Interdiction of Weapons of Mass Destruction' forthcoming (2007) 12(1) Journal of Conflict and Security Law; Heintschel von Heinegg (n 5) 193–4.

[44] Art 50, Articles on State Responsibility (n 2).

[45] See the ILC Commentary to the Articles on State Responsibility (n 2), reproduced in Crawford (n 1) 288–9 at (4) and (5).

To restate the arguments outlined above, it has been suggested that the existence of 'police powers' in UNCLOS demonstrates that such actions are not uses of force and that similar actions, taken as countermeasures, would also not be considered uses of force.[46] That is, the existence of exceptions to flag State jurisdiction allowing boarding and inspection of a vessel suspected of, for example, piracy or unauthorized broadcasting proves that—as these exercises of law enforcement jurisdiction have generally met with approval—they cannot be prohibited uses of force. Alternately, it has been suggested that boarding and seizing a vessel does not violate the prohibition on the use of force in Article 2(4) of the UN Charter, as the vessel is not relevantly part of the flag State's territory and such action could not be said to have the objective of compromising the State's political independence.[47] The contention of this note is that either approach introduces dangerous false distinctions. The preferable view is not that there is a new 'police action' exception to the use of force at sea, but that there is already a consent-based exception within the general law on the use of force which adequately explains these particular exceptions. This approach has the consequence of treating these exceptions as constituting either a closed category or as being examples of a *lex specialis* displacing the general rule prohibiting non-consensual high seas boarding of foreign vessels. If this approach is correct, one cannot circumvent the prohibition upon the use of force through argument by analogy or assimilation of one legal concept to another; one must prove that the international community of States has specifically approved in advance a rule permitting this otherwise impermissible act.

It is convenient to deal with the Charter point first. This argument relies upon reading the Article 2(4) prohibition upon 'the threat or use of force' in international relations as being qualified by the subsequent words:

> against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

That is, these words are said to have the effect that where force is not intended to (or cannot have the effect of) compromising a State's territorial integrity or political independence its use is permissible.[48] This argument can be disposed of by the simple observation that the general prohibition on the use of force in the UN Charter was not intended to be thus qualified. The words 'territorial integrity' and 'political independence' were added as a result of an Australian proposed wording to further guarantee the comprehensive nature of the prohibition, not to introduce exceptions or 'allowable' uses of force.[49] There is also a respectable body of opinion that equates an armed attack upon merchant shipping with an armed attack giving rise to a right of self-defence.[50] This at

[46] Rayfuse (n 7) 74.
[47] Kaye (n 5) 218.
[48] ibid; cf Bowett (n 24) 152.
[49] Franck (n 24) 12; Brownlie (n 24) 265–8; Simma (n 24) 123–4.
[50] D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP, Oxford, 1995)

the very least equates the security from interference of flag vessels with the 'political independence' of the flag State. This is hardly a surprising proposition: the freedom of the high seas reserved to States by international law can only be exercised by means of flag vessels. Unauthorized interference with flag vessels constitutes a clear attack on a State's sole means of exercising a fundamental right.

The only sense in which the Article 2(4) argument can be said to be correct is that it is for the State which is the subject of armed intervention to judge whether the action is consistent with its territorial integrity and political independence. That is, it has long been held that where a State *invites* military intervention in its territory, there is no breach of the rule against the use of force.[51] This rule may also be reformulated as being that State A may consent to the use of force by State B within the sphere of A's exclusive jurisdiction.[52] For example, States commonly authorize law-enforcement action upon their vessels by foreign officials under multilateral or bilateral treaties aimed at suppressing, inter alia, traffic in narcotic drugs.[53]

However, this cooperative action to suppress drug trafficking does not support the alternative argument that 'police actions' conducted by a State outside its own territory are not uses of force. The starting point in high-seas maritime law enforcement is that the principle of the exclusive jurisdiction of the flag State renders a vessel immune from foreign interference, unless there is either a permissive rule of international law allowing the interference or the flag State itself consents to the interdiction.[54] Article 110 of UNCLOS provides that upon the high seas a naval vessel of any State is justified in boarding and inspecting any foreign-flagged vessel where that vessel is suspected of: piracy; unauthorized broadcasting from the high seas; involve-

2; D Raab, '"Armed Attack" after the *Oil Platforms* Case' (2004) 17 Leiden Journal of International Law 719, 727; C Gray, 'The British Position with Regard to the Gulf Conflict (Iran–Iraq): Part 2' (1991) 40 ICLQ 464, 469; V Lowe, 'Self-Defence at Sea', in W Butler (ed), *The Non-Use of Force in International Law* (1989) 189; cf *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, *Judgment* [2003] ICJ Reports 161, 191, para 64. Some authorities are ambiguous as to whether self-defence would only arise if a military vessel is attacked: Bowett (n 24) 71; Art 6, North Atlantic Treaty, 1949, 34 UNTS 243 as amended by Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, 1951, 126 UNTS 350.

[51] M Shaw, *International Law* (5th edn, CUP, Cambridge, 2003) 1042–3; A Aust, *Handbook of International Law* (CUP, Cambridge, 2005) 224.

[52] cf *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, *Judgment* [2003] ICJ Reports 3, 169, para 49 (Diss Op Judge Van Den Wyngaert).

[53] See, eg, Art 17, UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 185 UNTS 453; Art 6, Agreement on illicit traffic by sea, implementing Art 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, 1995, ETS No 156; para 1, Agreement to facilitate the interdiction by the United States of vessels of the United Kingdom suspected of trafficking in drugs, 1981, 1285 UNTS 197; Art 5, Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea, 1990, 1776 UNTS 229. The US also has at least 24 such agreements with neighbouring countries.

[54] See the references at (n 9), above.

ment in the slave trade; being stateless; or, though refusing to show its own flag, in fact being of the nationality of the interdicting warship. These are the sole grounds, absent the consent of the flag State, when a State may ignore the exclusive jurisdiction principle. Of these provisions, only the grounds of piracy, being stateless, or having the same nationality, could be said to reflect customary international law. A general right to suppress the slave trade at sea was not widely accepted prior to UNCLOS,[55] and it is difficult to imagine that the practice of a handful of European States in suppressing high-seas 'pirate radio' broadcasts, principally in the period 1958–67, created generally binding international law.[56] Article 110, then, is partially a codification of prior general law and the creation, as among the parties, of new treaty-based rights of interference with vessels on the high seas. Article 110 as a whole, however, represents the prior consent of States to the interdiction of their vessels in certain cases. That consent is either implicit (in the case of pre-existing customary rules) or express (in the case of new treaty-based rules).

The point is not that a 'police action' is in any way *not* a use of force; it is simply not a *prohibited* use of force by operation of the consent principle. As 'police actions' under Article 110 have the prior consent of the flag State, through consent to be bound either by a rule of custom or treaty, they are permitted under international law and are not contrary to the general prohibition upon the use of force. Not only is this conclusion preferable as being the simpler analysis, it avoids the potential for countermeasures to be used as a form of gunboat diplomacy.[57]

## IV. CONCLUSION

There is a significant danger in promoting a turn to countermeasures as the universal panacea for international law's lack of centralized protection of collective interests. Indeed, there is a particular danger in assuming that the same rules of enforcement should apply in cases of collective obligations as in cases of injury to an individual State caused directly by another's wrongful act. Such arguments have, of course, a certain appeal. When many States abide by rules established in the collective interest it is galling to see 'free riders' act

[55] D Greig, *International Law* (2nd edn, Butterworths, London, 1976) 333–4; MS McDougal and WT Burke, *The Public Order of the Oceans* (New Haven, New Haven Press, 1985) 881 ff; R Reuland, 'Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 Vanderbilt Journal of Transnational Law 1161, 1190.

[56] See generally N Hunnings, 'Pirate Broadcasting in European Waters' (1965) 14 ICLQ 410; H Van Panhuys and M Van Emde Boas, 'Legal Aspects of Pirate Broadcasting: A Dutch Approach' (1966) 60 AJIL 303; H Robertson Jr, 'The Suppression of Pirate Radio Broadcasting: A Test Case of the International System for Control of Activities outside National Territory' (1982) 45 Law & Contemporary Problems 71.

[57] Bederman (n 1) 831.

with impunity in the absence of centralized sanctions. Countermeasures appear to hold out the prospect of effective enforcement and immediate results. Arguments about States acting for dubious motives seem irrelevant, as countermeasures would only allow limited and proportionate action to bring about compliance with a pre-existing obligation. However, a critical element in any conception of proportionality must be that when there is a choice of means, that which is least injurious to the rights of others be chosen. Port State control is strictly not even a countermeasure: it is retorsion, an unfriendly but perfectly legal act.[58] Where available as a means of inducing compliance it should certainly be preferred to countermeasures, which inherently involve suspending compliance with international obligations and are thus much more likely to seriously affect others' rights.

This note has sought to make three points. First, advocates of maritime interdiction as a collective interest countermeasure have failed to demonstrate any convincing theory upon which States can be considered relevantly 'injured' by breaches of the extremely diffuse collective obligations they invoke. Secondly, maritime interdiction cannot be thought of as anything other than a use of force which is prohibited unless consented to in advance by the flag State. Thirdly, it is in any event hard to see when this use of force—even if legal—could be regarded as proportionate given the availability of effective alternatives. The failure of arguments in favour of maritime interdiction as a countermeasure at each of these three levels reinforces the conclusion that collective problems will generally only be capable of collective solutions, no matter how appealing the prospect of unilateral enforcement of collective interests may seem.

[58] ibid 827; ILC commentary reproduced in Crawford (n 1) 281 at (3).